



James



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REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

H. C. W. WETHEY,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. XLII.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM, 41 VICTORIA, TO HILARY TERM, 41 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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DURING THE PERIOD OF THESE REPORTS.

THE HON. ROBERT ALEXANDER HARRISON, C. J.
“ “ ADAM WILSON, J.
“ “ JOHN DOUGLAS ARMOUR, J.

Attorney-General:
THE HON. OLIVER MOWAT.



A TABLE

OF THE

NAMES OF CASES REPORTED IN THIS VOLUME.

A.		D.	
	Page.		Page.
Amer, Regina et al v.....	391	Dake, Beigle v.....	250
B.		Demorest v. Miller.....	56
Bank of Montreal, Burgess v.....	212	Denny v. Montreal Telegraph Co....	577
Barber v. Maughan.....	134	Dickey et al., Nasmith v.....	350
Bartels v. Bartels et al.....	22	Drifill v. McFall.....	597
Bates et al., Churcher et al. v.....	466	E.	
Beigle v. Dake.....	250	Erb et al. v. Great Western R. W. Co.	90
Benscn v. Ottawa Agricultural Ins.		Essex, County of, and Rochester, Re.	523
Co.....	282	Evans, Hall v.....	190
Beveridge v. Creelman et al.....	29	F.	
Burgess v. Bank of Montreal.....	212	Fee et al., Robinson v.....	448
Burns et ux. v. Corporation of Toronto	560	Ford v. Gourlay.....	552
C.		Frontenac, Re, Mace and the County	
Chamberlain and Corporation of the		of.....	70
United Counties of Stormont, Dun-		G.	
das, and Glengarry, Re.....	279	Gibson v. Corporation of Ottawa....	172
Churcher et al. v. Bates et al.....	466	Gourlay, Ford v.....	552
Clarke v. Sarnia Street R. W. Co....	39	Graham v. McKernan.....	368
Clementson et al. v. Grand Trunk R.		Grand Trunk R. W. Co., Clement-	
W. Co.....	263	son v.....	263
Collins and Water Commissioners of		Great Western R. W. Co., Erb et al. v.	90
the City of Ottawa, Re.....	378	H.	
Corporation of Ottawa, Gibson v....	172	Hagarty v. Squier.....	165
Corporation of Toronto, Burns et ux. v.	560	Haines et al., Regina v.....	208
Corporation of United Counties of		Hall v. Evans.....	190
Stormont, Dundas, and Glengarry,		Hinton, Tylee et al. v.....	228
Re Chamberlain and.....	279	Hodgins et al., Currie v.....	601
County of Oxford, Re Revell and ...	337	Hughitt v. Saxton.....	49
County of Essex and Rochester, Re..	523		
Creelman et al., Beveridge v.....	29		
Currie v. Hodgins et al.....	601		

J.		R.	
	Page.		Page.
Jamieson, Marshall v.....	115	Regina v. Amer et al.....	391
Johnson, Standard Bank of Canada v.	16	Regina v. Haines et al.....	208
K.		Regina v. Nasmith.....	242
Kelly, Vansickle et al. v.....	274	Regina v. Ottawa and Glouster Road Co.....	478
King, McMaster et al. v.....	409	Regina v. Prittie.....	612
L.		Regina v. Sutton et al.....	220
Lake, Re.....	206	Regina v. Wilkinson.....	492
M.		Regina v. Williams.....	462
Mace and the County of Frontenac, Re.....	70	Reubottom and Corporation of United Counties of Northumberland and Durham, Re.....	358
Marshall v. Jamieson.....	115	Revell and The County of Oxford, Re.	337
Maughan, Barber v.....	134	Robinson v. Fee et al.....	448
Maughan et al., Plows v.....	129	Rochester, Re County of Essex and..	523
Miller, Demorest v.....	56	Royal Canadian Ins. Co., Steinhoff v.	307
Montreal Telegraph Co., Denny v...	577	S.	
Mc.		Sarnia Street R. W. Co., Clarke v...	39
McFall, Driffill v.....	597	Saxton, Hughitt.....	49
McKernan, Graham v.....	368	Smith, Patterson v.....	1
McMaster et al. v. King.....	409	Squier, Hagarty v.....	165
N.		Standard Bank of Canada v. Johnson	16
Nasmith v. Dickey et al.....	350	Steinhoff v. Royal Canadian Ins. Co.	307
Nasmith, Regina v.....	242	Stormont, Dundas, and Glengarry, United Counties of, Chamberlain v.	279
National Ins. Co, Ulrich v.....	141	Sutton et al., Regina v.....	220
Northumberland and Durham, United Counties of, Re, Reubottom and the Corporation of.....	358	T.	
O.		Tylee et al. v. Hinton.....	228
O'Donohoe v. Wilson.....	329	U.	
Ottawa Agricultural Ins. Co., Ben- son v.....	282	Ulrich v. National Ins. Co.....	141
Ottawa and Gloucester Road Co., Regina v.....	478	V.	
Ottawa, Water Commissioners of, Re Collins and,.....	378	Vansickle et al v. Kelly.....	274
Oxford Building Society v, Waterloo M. F. Ins. Co.....	181	W.	
Oxford, County of, Re Revell and...	337	Water Commissioners of Ottawa, Re, Collins and.....	378
P.		Waterloo M. F. Ins. Co., Oxford Building Society v.....	181
Patterson v. Smith.....	1	Wilkinson, Regina v.....	492
Plows v. Maughan et al.....	129	Williams, Regina v.....	462
Prittie, Regina v.....	612	Wilson, O'Donohoe v.....	329

A TABLE

OF THE

NAMES OF CASES CITED IN THIS VOLUME.

A.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE
Abbott v. Bates.....	43 L. J. C. P. 150.....	126
Abley v. Dale	11 C. B. 378	500
Adams v. Inhabitants of Carlisle.....	21 Pick 146.....	564
Alexander v. McKenzie.....	6 C. B. 766	98
Allan v. Garratt et al.....	30 U. C. R. 165.....	416, 440
Anderson, Ex parte.....	3 E. & E. 487.....	395
Anderson v. Northern R. W. Co.....	25 C. P. 301.....	584
Anderson v. Rannie.....	12 C. P. 536.....	554
Ansell v. Baker.....	15 Q. B. 20.....	606, 607
Anstee v. Nelms.....	1 H. & N. 225.....	28
Appleby v. Johnson.....	L. R. 9 C. P. 158	121
Armour v. Gates.....	8 C. P. 548.....	167
Asher v. Whitlock.....	L. R. 1 Q. B. 1.....	8
Ashworth, Ex parte re Hoare.....	L. R. 18 Eq. 705.....	416, 432
Atkyn v. Pearce	2 C. B. N. S. 763.....	246
Attorney-General v. Bertrand	L. R. 1 P. C. 520	405
Attorney-General v. Great Western R. W. Co.....	30 L. J. Ch. 17	42
Attorney-General v. Newman.....	1 Price 438	394, 405
Axford v. Prior.....	14 Ir. R. 611	583, 590
Aynsley v. Glover.....	L. R. 18 Eq. 844; L. R. 10 Ch. 283, 201	

B.

Backus v. Schooner, Marengo.....	6 McLean 487.....	95
Bacon v. City of Boston.....	3 Cush. 174.....	566
Baggallay v. Borthwick....	10 C. B. N. S. 61.....	383
Bahia and San Francisco R. W. Co. (Limited) Tritton et al., Re.....	L. R. 3 B. 584	102
Bailey v. Edwards.....	4 B. & S. 761	604
Bailey v. Griffith.....	40 U. C. R. 418.....	604, 605
Baker Re.....	2 H. & N. 219.....	616
Baker, Kennedy, and Corporation of the Township of Salfleet, Re	31 U. C. R. 386.....	80
Baker et al v. Lyman.....	38 U. C. R. 498.....	120, 128
Balbirnie, In re Ex parte Jameson.....	L. R. 3 Ch. D. 488.....	433
Balsam v. Robinson.....	19 C. P. 263	53
Baltimore, Mayor, &c., of v. Marriott...	9 Ind. 160	574
Banbary v. White et al.....	2 H. & C. 300.....	138
Bank of Augusta v. Earle.....	13 Peters 519	158
Bank of Australasia v. Breillat	6 More P. C. 152.....	46
Bank of Hamilton v. Western Ass. Co....	38 U. C. R. 609.....	185

B.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE
Bank of Montreal v. DeLatre.....	5 U. C. R. 362.....	168
Barnes v. Ward.....	9 C. B. 392.....	590
Barracrough v. Johnson.....	8 A. & E. 99.....	36
Barry v. Croskey.....	2 Johns & H. 23.....	102
Bartlett, Ex parte.....	30 L. J. Mag. Cas. 65.....	487
Barwick v. English Joint Stock Bank ...	L. R. 2 Ex. 259.....	100, 108, 109, 307, 431
Bates, Re.....	42 U. C. R. 284.....	617
Bateson v. Gosling.....	L. R. 7 C. P. 9.....	608
Bayley v. Bradley.....	5 C. B. 396.....	12
Bayley v. Manchester Sheffield and Lin- conshire R. W. Co.....	L. R. 7 C. P. 415; L. R. 8 C. P. 148.....	104
Bayspoole v. Collins.....	L. R. 6 Ch. 228.....	62, 63
Beadle v. Chenango Co., Mutual Ins. Co.	3 Hill 161.....	290
Bedford v. McKowl.....	3 Esp. 119.....	557
Beebce v. Hartford County Mutual Ins. Co.....	25 Conn. 51; 4 Bennett 55.....	294
Beeman v. Knapp.....	13 Grant 398.....	61, 65
Behn v. Burness.....	3 B. & S. 751.....	302
Belford v. Haynes.....	7 U. C. R. 464.....	35, 37
Bell v. Banks.....	3 M. & G. 258.....	606
Benedict v. Ocean Ins. Co.....	1 Daly. 8; 4 Bennett 462.....	296
Benner v. Currie.....	36 U. C. R. 411.....	352, 355
Bernard's Case.....	5 DeG. & Sm. 282.....	106
Berry v. Da Costa.....	L. R. 1 C. P. 331.....	557
Betts v. Neilson.....	L. R. 3 Ch. 429.....	104
Biggar v. Allan.....	15 Grant 358.....	196
Billings v. City of Worcester.....	102 Mass. 329; 3 Am. 460.....	568
Billington v. Provincial Ins. Co.....	24 Grant 299.....	159
Bird v. Holbrook.....	4 Bing. 628.....	590
Birkley v. Presgrave.....	1 East 220.....	321
Birt v. Barlow.....	1 Doug. 171.....	502
Bissell v. Michigan Southern and North- ern Indiana R. W. Co.....	22 N. Y. 458.....	42
Blackett v. Royal Exchange Ass. Co.....	2 C. & J. 244; 2 Tyr. 266.....	321
Blackmore v. Toronto Street R. W.....	38 U. C. R. 172.....	584
Blanchard v. Bridges.....	4 A. & E. 176.....	196, 202
Bleakley v. Niagara District Mutual Ins. Co.....	16 Grant 198.....	290, 294
Bliss v. Collins.....	5 B. & Al. 876.....	8
Boaler v. Mayor.....	19 C. B. N. S. 76.....	601, 607, 611
Board v. Board.....	L. R. 9 Q. B. 48.....	15, 28
Bohland v. McCarrall.....	38 U. C. R. 487.....	232
Boston and Maine Railroad v. Bartlett...	3 Cush. 224.....	121
Boulton et al. v. Smith.....	17 U. C. R. 400; 18 U. C. R. 459	332, 336
Bourne v. Gatliff.....	11 Cl. & F. 45.....	119, 128
Boyd v. Hind.....	1 H. & N. 938.....	435
Boyle et ux. v. Corporation of Dundas...	25 C. P. 420; 27 C. P. 129.....	564, 565, 566, 584, 593
Bradhurst v. Columbian Ins. Co.....	9 Johns. 9.....	319
Bradshaw and East and West India Docks and Birmingham Junction R. W. Co. Re.	12 Q. B. 562.....	383, 386
Brand et ux. v. Hammersmith and City R. W. Co.....	L. R. 4 H. L. 171.....	385
Braunstein v. Accidental Death Ins Co...	1 B. & S. 782.....	160

B.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Bridges v. Directors, &c., of the North London R. W. Co.....	L. R. 7 H. L. 213.....	584
Brighton Arcade Company (Limited) v. Dowling.....	L. R. 3 C. P. 17.....	354
Brine v. Great Western R. W. Co.....	2 B. & S. 402.....	442
Brisban v. Boyd.....	4 Paige 17.....	123.
British and American Telegraph Co. v. Colson.....	L. R. 6 Ex. 108.....	120.
British Columbia, &c., Saw Mill Co., (Limited) v. Nettleship.....	L. R. 3 C. P. 499.....	94, 104
Brockwell's Case.....	4 Drew. 205.....	106
Broderick et al. v. Scale.....	L. R. 6 C. P. 98.....	138
Brown v. Blackwell.....	35 U. C. R. 239.....	9
Brown v. Corporation of Belleville.....	30 U. C. R. 373.....	178
Brown v. Municipal Council of the County of York.....	8 U. C. R. 596.....	35, 37
Brown et al v. Powell Duffryn Steam Coal Co.....	L. R. 10 C. P. 562.....	95.
Browne v. Hare.....	4 H. & N. 822.....	124
Brudnell v. Roberts.....	2 Wils. 143.....	12
Brummell v. Wharin.....	12 Grant 283.....	196
Buccleuch v. Metropolitan Board of Works	L. R. 5 Ex. 221; L. R. 5 H. L. C. 418; L. R. 7 H. L. 243..	384, 386, 388
Buckle v. Mitchell.....	18 Ves. 100.....	62
Buffalo and Lake Huron R. W. Co. v. Whitehead.....	8 Grant 157.....	178
Burke v. Dublin Trunk Connecting R. W. Co.....	L. R. 3 Q. B. 47.....	352, 357
Burrels, Ex parte, Re Robinson.....	L. R. 1 Ch. D. 537.....	433
Burritt and the Corporation of Marlborough, Re.....	29 U. C. R. 119.....	384
Burrows v. Cairnes.....	2 U. C. R. 288.....	454
Buthurst v. Errington.....	L. R. 2 Ap. 698.....	26.

C.

Caldecott v. Smythies.....	7 C. & P. 808.....	454
Calvin v. Provincial Ins. Co.....	20 C. P. 267.....	43.
Cameron v. Holland.....	29 U. C. R. 506.....	17, 20
Cameron v. Knapp.....	7 C. P. 502.....	235
Cameron v. McRae.....	3 Grant 311.....	234
Campbell v. Campbell.....	14 U. C. R. 17.....	9
Campbell v. Edwards.....	24 Grant 152.....	171
Campbell v. Im Thurn.....	L. R. 1 C. P. D. 267.....	20, 440, 447
Canada Life Ass. Co. v. O'Loane.....	32 U. C. R. 379.....	506
Canada Southern R. W. Co. and Norvall, Re.....	41 U. C. R. 195.....	390
Carpenter v. Gwynn.....	35 Barb. 395.....	36.
Carr v. London and North Western R. W. Co.....	L. R. 10 C. P. 307.....	102, 103
Carroll v. Burgess.....	40 U. C. R. 381.....	214
Carter v. Bingham.....	32 U. C. R. 615.....	121
Castor v. Corporation of Uxbridge.....	39 U. C. R. 113.....	563, 566, 567, 568, 574, 575, 584
Castrique v. Buttigreg.....	10 Moore P. C. 94.....	167
Caswell v. St. Mary's, &c., Road Co.....	28 U. C. R. 247.....	570, 572, 584
Cave v. Mills.....	7 H. & N. 913.....	102.

C.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Chaffey v. Schooley.....	40 U. C. R. 165.....	321
Chandler v. Thompson.....	3 Camp. 80.....	202, 203
Chapman v. Bothwell.....	E. B. & E. 168.....	583, 590
Chapman, d. Staverton v. Emery.....	Cowp. 278.....	63
Chatillon v. Canada Mutual Fire Ins. Co.	27 C. P. 450.....	294, 296
Cheesebrough v. Wright.....	28 Beav. 283.....	440
Chinnock v. Marchioness of Ely.....	4 DeG. J. & Sm. 638.....	120
Chippendale, Ex parte.....	4 DeG. M. & G. 19.....	45
Christie v. Clarke.....	16 C. P. 544.....	8
City Bank v. Cheney et al.....	15 U. C. R. 400.....	169
City of Glasgow Union R. W. Co.....	L. R. 2 Sc. App. 78.....	385
Clark et al. v. Dales et al.....	20 Barb. 42.....	119, 123
Clarke v. Union Mutual Fire Ins. Co....	40 N. H. 333.....	292
Clarke v. Dickson.....	6 C. B. N. S. 453.....	102
Clarke v. Rose.....	29 U. C. R. 302.....	118, 124
Clarke v. Wright.....	6 H. & N. 849.....	63
Clifford v. Hoare.....	L. R. 9 C. P. 362.....	277
Clowes v. Staffordshire Potteries Water Works Co.....	L. R. 8 Ch. 125.....	384
Cockburn v. Sylvester.....	1 App. 471.....	270
Cocks v. Nash.....	9 Bing. 341.....	609
Coe and Corporation of the Township of Pickering, Re.....	24 U. C. R. 439.....	79, 87, 88
Coker, Ex parte, Re Blake.....	L. R. 10 Ch. 652.....	432
Coleman v. McDermott.....	1 E. & A. 445.....	118, 125
Coleman v. Riches.....	16 C. B. 104.....	95, 105
Collins v. City of Council Bluffs.....	32 Iowa 324; 7 Am. 200.....	568
Collins v. Owen.....	15 L. T. N. S. 327.....	605
Columbia Ins. Co. v. Cooper.....	50 Penn 331.....	294
Columbia Ins. Co. of Alexandria v. Law- rence.....	10 Peters 507.....	292
Columbian Ins. Co. v. Ashby.....	13 Peters 331.....	319
Combs v. Hannibal Ins. Co.....	43 Mo. 148.....	293
Commercial Ins. Co. v. Spankneble.....	52 Ill. 53; 4 Am. 582.....	293
Commercial Union Mutual Ins. Co. v. Smith.....	33 U. C. R. 529.....	370
Commonwealth v. Newbury.....	2 Pick. 51.....	36
Continental Ins. Co. v. Kasey.....	18 Am. 681.....	295
Cook v. City of Milwaukee.....	24 Wis 270; 1 Am. 183.....	568
Cooley v. Smith.....	40 U. C. R. 543.....	616
Coombs v. New Bedford Cordage Co.....	102 Mass. 572.....	584
Cooper v. Hubbuck.....	9 Jur. N. S. 457.....	203
Copper Mining Co. v. Fox.....	16 Q. B. 229.....	43
Corby v. Hiel.....	4 C. B. N. S. 556.....	591
Cornfoot v. Fowke.....	6 M. & W. 358.....	99
Cornish v. Abingdon.....	4 H. & N. 549.....	102
Cornish v. Stubbs.....	L. R. 5 C. P. 334.....	454
Cornman v. Eastern Counties R. W. Co..	4 H. & N. 781.....	584, 589
Cornwall v. Queen.....	33 U. C. R. 106.....	210
Corrie et al. v. Cleaver et al.....	21 C. P. 186.....	132
Cotterell v. Griffiths.....	4 Esp. 69.....	202
Cotterell v. Homer.....	13 Sim. 506.....	63
Cotton v. Wood.....	8 C. B. N. S. 568.....	564, 575
Couch v. Steel.....	3 E. & B. 482.....	489
County of Lincoln, Corporation of v. Cor- poration of Niagara.....	25 U. C. R. 578.....	343
Courtauld v. Legh.....	L. R. 4 Ex. 126.....	199

C.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Cousens v. Rose.....	L. R. 12 Eq. 366.....	277
Cowasgee v. Thompson.....	5 Moore P. C. 165.....	124
Cowie v. Apps.....	22 C. P. 589.....	126
Cowper v. Smith.....	4 M. & W. 519.....	608
Cox v. Feeney.....	4 F. & F. 13.....	504, 521
Coxon v. Great Western R. W. Co.	5 H. & N. 274.....	42
Cracknell v. Mayor of Hartford.....	L. R. 4 C. P. 629.....	385
Crofts v. Marshall.....	7 C. & P. 589.....	321
Cuming v. Brown.....	9 East 506.....	270
Cumming v. Shand.....	5 H. & N. 95.....	119, 128
Cummins v. Credit Valley R. W. Co.....	21 Grant 162.....	385
Cuthbertson v. Irving.....	4 H. & N. 742; Ex. Ch. 6 H. & N. 135.....	8, 13, 14

D.

Da Costa v. Edmunds.....	4 Camp. 142.....	325
Dagenham (Thames) Docks Co., Re, Ex parte Hulse.....	L. M. 8 Ch. 1022.....	239
Daking v. Whimper.....	26 Beav. 568.....	63
Daniels v. Davison.....	16 Ves. 249.....	454
Darling v. McLean.....	20 U. C. R. 372.....	608
Dartmouth College v. Woodward.....	4 Wheat. 518.....	158
Dauglis v. Tennent.....	L. R. 2 Q. B. 49.....	447
Davis v. Connop.....	1 Price 53.....	454
Davis v. Henderson.....	29 U. C. R. 344.....	255
Davis v. Scottish Provincial Ins. Co.....	16 C. P. 176.....	293
Davis v. Stainback.....	6 DeG. M. & G. 679.....	170, 605
Davis v. Stewart.....	8 C. P. 482.....	505
Davis v. Stewart et al.....	18 C. P. 482; 29 U. C. R. 441.....	506
Dawson et al. v. Fitzgerald.....	L. R. 1 Ex. D. 257.....	148, 161
Dear v. Western Assurance Co.....	41 U. C. R. 553.....	159
Dennis v. Hughes.....	8 U. C. R. 444.....	35, 37
Dent v. Auction Mart Co.....	L. R. 2 Eq. 238.....	201
Dent v. Nicholls.....	20 W. R. C. P. 218, Nov. 1874.....	126
Denton v. Peters.....	L. R. 5 Q. B. 475.....	167
DesBarres v. Shey.....	22 W. R. 273; 29 L. T. N. S. 592..	261
Deslandes v. Gregory et al.....	2 E. & E. 602.....	169
De Vaux v. Salvador.....	4 A. & E. 420.....	325
Deverill v. Grand Trunk R. W. Co.,.....	25 U. C. R. 517.....	575, 564
Dewhurst, Ex parte.....	L. R. 7 Ch. 185.....	377
Dickson v. Hiliard.....	L. R. 9 Ex. 79.....	504
Dickenson v. Jardine.....	L. R. 3 C. P. 639.....	319, 322, 328
Digges's Case.....	1 Coke 157a, 173a, 173b.....	68
Dingman v. Austin.....	33 U. C. R. 290.....	131
Divisional Council of Cape Division & De Villiers.....	L. R. 2 App. Cas. 567.....	384
Dixon v. Swansea Vale and Neath and Brecon Junction R. W. Co.....	L. R. 4 Q. B. 44.....	442
Dodgson's Case.....	3 DeG. & Sm. 85.....	106
Doe d. Banning v. Griffin.....	15 East 293.....	262
Doe d. Carter v. Barnard.....	13 Q. B. 945.....	10, 255
Doe d. Cuthbertson v. McGillis.....	2 C. P. 124.....	255
Doe d. Daniels v. Woodroffe.....	10 M. & W. 608.....	8
Doe d. Harley v. McManus.....	1 U. C. R. 141.....	9, 15
Doe v. Harlow et al.....	12 A. & E. 40.....	456
Doe d. Higginbotham v. Barton.....	11 A. & E. 307.....	12

D.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE
Doe d. Hughes v. Jones.....	9 M. & W. 372.....	216
Doe d. Morrough v. Maybee.....	2 U. C. R. 389.....	500
Doe d. Newman v. Rusham.....	17 Q. B. 723.....	62, 66
Doe d. Notman v. McDonald.....	5 U. C. R. 321.....	475
Doe d. Oldham v. Wolley.....	8 B. & C. 22.....	262
Doe d. Otley v. Manning.....	9 East 59.....	62, 63
Doe d. Perry v. Henderson.....	3 U. C. R. 486.....	256
Doe d. Pettit v. Ryerson.....	9 U. C. R. 276.....	255
Doe d. Phillpott v. Blanchfield.....	1 U. C. R. 350.....	63
Doe d. Proudfoot v. McCrae.....	6 O. S. 502.....	66
Doe d. Richardson v. Dafeo.....	4 U. C. R. 484.....	454
Doe d. Topfield v. Topfield.....	11 East 246.....	8
Doe d. Upton u. Well.....	1 Leon. 145.....	456
Doe d. Upton v. Witherwick.....	3 Bing. 11.....	454, 455
Dolman v. Nokes.....	22 Beav. 402.....	430
Donald v. Upper Canada Mining Co....	15 Grant 179.....	46
Dornyn v. Fralick.....	21 Grant 191.....	235
Dow v. Black.....	L. R. 6 P. C. 31.....	156
Doyle v. Lord.....	21 Am. 629.....	198
Drake v. City of Lowell.....	13 Metc. 292.....	566
Drayton v. Dale.....	2 B. & C. 293.....	376
Dredge v. Watson.....	33 U. C. R. 165.....	440
Druiff v. Lord Parker.....	L. R. 5 Eq. 131.....	167
Duke et al. v. Andrews.....	2 Ex. 290.....	121
Duncan, Ex parte.....	16 L. C. Jur. 188 (1872).....	616
Dundas v. Johnston.....	24 U. C. R. 547.....	255
Dungeo v. Mayor of London.....	38 L. J. C. P. 298; 17 W. R. 1106.....	385
Dunlop v. Higgins.....	1 H. G. 381.....	120
Dunn v. Irwin.....	25 C. P. 111.....	370
Durkin v. City of Troy.....	61 Barb. 437.....	574
Dutton v. Marsh.....	L. R. 6 Q. B. 361.....	167, 169

E.

Edmondson v. Machell.....	2 T. R. 4.....	557
Edwards v. Aberayron Mutual Ship Insurance Society (Limited).....	L. R. 1 Q. B. D. 563.....	161
Eliason v. Henshaw.....	4 Wheat 225.....	119
Elliott v. Hamilton Mutual Ins. Co.....	13 Gray Mass. 139.....	292
Elliott v. Pray.....	10 Allen 378.....	584
Elliott v. Royal Exchange Ass. Co.....	L. R. 2 Ex. 237.....	149, 160
Engleback v. Nixon.....	L. R. 10 C. P. 645.....	377
English and Foreign Credit Co. (Limited) Proprietors of v. Arduin et al.....	L. R. 5 H. L. 64.....	120
Eureka Ins. Co. v. Robinson.....	56 Penn. St. 226.....	291
Evans v. Mann.....	Cowp. 569.....	376
Evans v. Walton.....	L. R. 2 C. P. 615.....	556
Ewart v. Weller.....	5 U. C. R. 610.....	167, 168
Ewin v. Lancaster.....	6 B. & S. 571.....	604, 605

F.

Farewell v. Chaffey.....	1 Burr. 53.....	197
Farmeloe et al. v. Bain et al.	L. R. 1 C. P. D. 445.....	102
Farrell v. O'Niel.....	22 C. P. 31.....	17, 20
Faulkner v. Saulter.....	1 P. R. 48.....	383, 384
Felthouse v. Bindley.....	11 C. B. N. S. 869.....	121

F.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE
Fenno v. Weston.....	31 Verm. 345.....	119, 121
Ferrand v. Milligan.....	15 L. J. G. B. 103.....	513
Findley v. Pedan.....	26 C. P. 483.....	8
Finnerty v. Tipper.....	2 Camp. 72.....	510
Fitch v. Lemmon.....	27 U. C. R. 273.....	506
Flannagan v. Bishop Wearmouth.....	8 E. & B. 451.....	244, 246
Fletcher v. Alexander.....	L. R. 3 C. P. 375.....	322
Flower v. Lloyd.....	L. R. 6 Ch. D. 297.....	598
Ford v. Earl Chesterfield.....	19 Beav. 428.....	232
Ford v. Yates.....	2 M. & G. 549.....	119, 126
Forrest v. Manchester and Sheffield and Lincolnshire R. W. Co.....	30 Beav. 40.....	42
Forsyth v. Boyle.....	28 C. P. 26.....	475
Foster v. De La Tour.....	2 E. & B. 678.....	118
Foster v. Geddes.....	14 U. C. R. 239.....	169
Fowler v. Down.....	1 B. & P. 44.....	375
Fraser v. Bank of Toronto.....	19 U. C. R. 381.....	336
Freeman v. Buckingham.....	18 How. 182.....	95
Freeman v. Cooke.....	2 Ex. 654.....	16, 102
Frost v. Knight.....	L. R. 7 Ex. 111.....	118
Fulton v. Cummings et al.....	34 U. C. R. 331.....	24, 28

G.

Gadd v. Houghton.....	L. R. 1 Ex. D. 357.....	169
Garritt v. Sharp.....	3 A. & E. 325.....	202
Garside v. King.....	2 Grant 673.....	66
Gates v. Madison County Mutual Ins. Co.....	2 Coms. N. Y. 43.....	292
Geddes v. Banks Reservoir Co.....	L. R. 11 Ir. C. L. 160.....	385
George v. Chambers.....	11 M. & W. 149.....	486
George v. Glass.....	14 U. C. R. 514.....	124
Gibb v. Shaw.....	18 U. C. R. 165.....	506
Gibboney v. Gibboney.....	36 U. C. R. 236.....	454
Gilbert v. City of Roxburg.....	100 Mass. 185.....	568
Glasgow, City of, Union R. W. Co. v.....	L. R. 2 Sc. App. 78.....	385
Glendinning, Ex parte.....	Buck 517.....	609
Good v. Cheesman.....	2 B. & Ad. 328.....	435
Goodright d. Humphreys v. Moses.....	2 W. Bl. 1019.....	62
Gore Bank v. McWhirter.....	18 C. P. 293.....	607
Gould v. Oliver.....	2 M. & G. 208.....	325
Graham v. McArthur.....	25 U. C. R. 478.....	615, 617
Grant v. Norway.....	10 C. B. 665.....	95, 98, 105
Gray v. Rickford.....	1 App. 112.....	255
Great Western R. W. Co. v. Baby.....	12 U. C. R. 106.....	390
Great Western R. W. Co. v. Blake.....	7 H. & N. 987.....	42
Great Western R. W. Co. and Chauvin, Re.....	1 P. R. 288.....	389
Great Western R. W. Co. v. Prestin and Berlin R. W. Co.....	17 U. C. R. 477.....	43
Great Western R. W. Co. v. Warner.....	19 Grant 506.....	389
Green v. Danby.....	12 Vern. 338.....	567
Green v. Sichel.....	7 C. B. N. S. 747.....	124, 128
Green v. Wright.....	24 U. C. R. 245.....	554
Green v. Wynn.....	L. R. 4 Ch. 204.....	608
Greenland v. Chaplin.....	5 Ex. 243.....	593
Greenough v. McClelland.....	2 E. & E. 424.....	604, 605
Greenwood v. Greenwood.....	L. R. 5 Ch. D. 954.....	26
Gregg v. Wells.....	10 A. & E. 90.....	16

G.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Gregory v. Patchett.....	33 Beav. 595.....	42
Gregory v. Wilson.....	9 Hare 683.....	238
Grey v. Richford.....	1 App. 112.....	15
Grierson v. Ontario.....	9 U. C. R. 623.....	347
Grierson v. Provisional Municipal Council of County of Ontario.....	9 U. C. R. 623.....	84
Griggs v. Billington.....	27 U. C. R. 520.....	161, 149
Grissel's Case.....	L. R. 1 Ch. 528.....	354
Guest v. Regnald.....	18 Am. 570.....	198
Gunter v. Astor.....	4 J. B. Moore 12.....	556, 559
Gwynn v. South-Eastern R. W. Co.....	18 L. T. N. S. 738.....	506

H.

Habergham v. Ridehalgh.....	L. R. 9 Eq. 398.....	25
Hacking v. Corporation of the County of Perth.....	35 U. C. R. 460.....	532
Halford, Ex parte Re Jacobs.....	L. R. 19 Eq. 436.....	432
Hall v. Francis.....	4 C. P. 210.....	168
Hall v. Janson.....	4 E. and B. 500.....	321
Hall v. Manchester.....	40 N. H. 410.....	567
Hall v. Mayor, &c., of Swansea.....	5 Q. B. 526.....	42
Hamilton v. Holcomb.....	12 C. P. 38, 2 E. & A. 230.....	607
Hamilton v. Watson.....	12 Cl. & F. 109.....	431
Hardcastle v. South Yorkshire R. W. and R. D. Co.....	4 H. & N. 67.....	590
Harding v. Knowlson et al.....	7 U. C. R. 564.....	332, 336
Harding v. Wilson.....	2 B. & C. 96.....	277
Hardy v. Unioa Mutual Fire Ins. Co. . .	4 Allen 217.....	302
Hare v. London and North-Western R. W. Co.....	2 J. & H. 80.....	42
Hare v. Proudfoot.....	6 O. S. 617.....	8
Harris v. Ryding.....	5 M. & W. 60.....	277
Harrison v. Douglas.....	40 U. C. R. 410.....	129, 130, 132
Hart v. City of Brooklyn.....	36 Barb. 226.....	566
Hartman v. Fleming et al.....	30 U. C. R. 209.....	28, 61
Harton v. Sayer.....	4 H. & N. 643.....	160
Harty v. Gooderham.....	31 U. C. R. 18.....	120
Hawksbee v. Hawksbee.....	11 Hare 230.....	28
Hazzard v. Canada Agricultural Ins Co..	39 U. C. R. 419.....	290
Healey v. Crummer.....	11 C. P. 527.....	554
Heath v. Bucknall.....	L. R. 8 Eq. 1.....	196, 201
Hedley v. Barlow et al.....	4 F. & F. 224.....	505, 511, 518
Helsham v. Blackwood.....	11 C. B. 111.....	506
Henkel v. Pape.....	L. R. 6 Ex. 7.....	120
Henwood v. Harrison.....	L. R. 7 C. P. 606.....	504, 505
Herbert v. Sayer.....	5 Q. B. 965.....	370, 376
Hesse v. Stevenson.....	3 B. & P. 565.....	376
Heward v. Jackson.....	21 Grant 263.....	277
Heward v. Mitchell.....	11 U. C. R. 625.....	332
Hewison v. Negus.....	16 Beav. 595.....	62, 63
Heyland v. Scott.....	19 C. P. 165.....	255
Hill v. Montague.....	2 M. & S. 377.....	371
Hodges v. City of Buffalo.....	2 Denis 110.....	343
Hodgson v. Municipal Council of York and Peel et al.....	13 U. C. R. 268.....	84
Hodgsons v. Gascoigne.....	5 B. & Al. 88.....	454, 455

H.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Hogan v. Aikman.....	30 U. C. R. 14	554
Holliday v. Ontario Farmers' Mutual Ins. Co.....	1 App. 483	504
Holmes v. Bell.....	3 M. & G. 213.....	606
Holton v. Sanson.....	11 C. P. 606.....	94, 102, 114
Honeyman v. Marryatt.....	6 H. L. 112.....	121
Hooker v. Gamble et al.....	9 C. P. 434; 12 C. P. 512; 13 C. P. 462.....	608, 610
Horsfall v. Thomas	1 H. & C. 90.....	430
Horsman v. Grand Trunk R. W. Co	30 U. C. R. 130; 31 U. C. R. 535..	102
Horton v. Inhabitants of Ipswich	12 Cush. 488.....	574
Horton v. Sayer	4 H. & N. 643.....	148
Hostrawser v. Robinson	23 C. P. 350	185
Houck v. Town of Whitby	14 Grant 671.....	43
Houghton v. Thompson.....	25 U. C. R. 557	500
Hounsell v. Smyth.....	7 C. B. N. S. 731.....	583, 589
Howard v. Crowther	8 M. & W. 601.....	557
Howe Machine Co. v. Walker.....	35 U. C. R. 37	158
Howland v. Brown.....	13 U. C. R. 199.....	118, 125
Howland v. McNal.....	8 Grant 47.....	42
Hubbard v. City of Concord.....	35 N. H. 52.....	574
Hubbesty v. Ward	8 Ex. 330	105
Hughes v. Canada Permanent Building and Savings' Society	39 U. C. R. 322.....	42, 47, 178
Hughes v. Great Western R. W. Co.....	14 C. B. 637.....	521
Hughes v. Metropolitan R. W. Co.....	L. R. 1 C. P. D. 120.....	239
Hull v. Pickersgill.....	1 B. & B. 282.....	373
Hunter v. Farr.....	23 U. C. R. 324	255
Hunter v. Sharpe.....	4 F. & F. 983.....	505, 521
Hutchins v. City of Boston.....	12 Allen 571; 97 Mass. 272.....	568
Hutchinson v. Collier.....	27 C. P. 249	214
Hutchinson v. Copestake	8 C. B. N. S. 102, 9 C. B. N. S. 863	196, 203
Hutchinson et al. v. Bowker et al.	5 M. & W. 535.....	121
Hutton v. Corporation of Windsor.....	34 U. C. R. 487	565, 574
Hutton v. Town of Windsor	34 U. C. R. 487	584
Hyde v. Wrench.....	3 Beav. 334.....	121

I.

Indermaur v. Dames	L. R. 1 C. P. 274, Ex. Ch. L. R. 2 C. P. 311.....	584, 591
Imperial Land Co. of Marseilles, Re.....	L. R. 7 Ch. 587.....	120
Irwin v. Dearman.....	11 East 23.....	557
Irwin v. Maughan	26 C. P. 455.....	129, 131, 133

J.

Jackson v. Duke of Newcastle	3 DeG. J. & S. 275.....	201
Jacobs v. Equitable Fire Ins. Co.....	18 U. C. R. 140.....	290
James v. Hawkins	25 C. P. 346	554
James v. Hayward.....	Sir W. Jones 221.....	277
Jenkins v. Fereday.....	L. R. 7 C. P. 358.....	432
Jessel v. Bath.....	L. R. 2 Ex. 267	95
Job v. Banister.....	2 Kay & J. 374.....	238
John v. Bacon.....	L. R. 5 C. P. 437.....	584, 594
Johnson v. Chapman	19 C. B. N. S. 563.....	322, 327

J.

NAME OF CASE CITED.	WHERE REPORTED	PAGE
Johnson et ux. v. City of Lowell.....	12 Allen 572.....	568
Johnston v. Boyle	8 U. C. R. 142.....	37
Johnston v. Charleston	16 Am- 721.....	566
Johnston v. McKenna	3 P. R. 229.....	454
Jones v. Reid	1 P. R. 247.....	383, 384
Jones v. Reynolds	1 G. C. 506.....	461
Jones v. Stanstead, Shefford and Shanby R. W. Co.....	L. R. 5 P. C. 98.....	385
Jones v. Tapling.....	11 H. L. 290; 11 C. B. N. S. 308 196, 199, 200,	385 203
Jordon v. Norton	4 M. & W. 155.....	121
Jumel v. Marine Ins. Co.....	7 Johns. 412.....	320
Junkin v. Davies ..	6 C. P. 408	53

K.

Kearsley v. Cole.....	16 M. & W. 123	608
Kelly v. Tindling	L. R. 1 G. B. 699.....	505
Kemp v. Halliday.....	6 B. & S. 723.....	328
Kernaghan v. McNally.....	12 Ir. Ch. 89.....	23
Keys v. Guy.....	36 U. C. R. 356	454
King v. Smith.....	19 C. P. 319	17, 20
Kinghorne v. Montreal Telegraph Co....	18 U. C. R. 60	119
Kingsbury v. Collins	4 Bing. 207	454
Kino v. Rudkin.....	L. R. 6 Ch. D. 160.....	201
Kipp v. Synod of the Diocese of Toronto.	33 U. C. R. 220.....	255
Kitchen v. Hawkins.....	L. R. 2 Q. B. 31.....	441
Knaggs v. Ledyard	12 Grant 320.....	214
Knapp v. Cameron.....	6 Grant 559	231, 232, 235, 237
Knights v. Wiffen.....	L. R. 5 Q. B. 660.....	16
Kough v. Price.....	27 C. P. 309.....	332

L.

Lafferty v. Municipal Council of Went- worth and Halton, Re.....	8 U. C. R. 232.....	80
Lage v. Mackenson	40 U. C. R. 388.....	255
Laing v. Taylor	20 C. P. 416, 26 C. P. 416	167, 168, 170, 171
Lake v. Bemnis	4 C. P. 430.....	552, 555
Lake v. Corporation of Prince Edward, Re	26 C. P. 173.....	358, 364, 365, 615
Lampkin v. Western Ass. Co.....	13 U. C. R. 237.....	290
Lancaster v. Hennington.....	4 A. & E. 345.....	383
Lanfranchi v. Mackenzie	L. R. 4 Eq. 421	201
Lang Ex parte	37 L. T. N. S. 446.....	440
Lang Ex parte Re Lang	L. R. 5 Ch. D. 971	21
Leask v. Scott	L. R. 2 Q. B. D. 376.....	269, 273
Leather v. Simpson	L. R. 11 Eq. 398.....	99
Le Conteur v. London and South Western R. W. Co	L. R. 1 Q. B. 54.....	42
Lee v. Howard Fire Ins. Co	3 Gray 583; 3 Bennet 733.....	293
Lee v. Jones	17 C. B. N. S. 482.....	431
Leech v. Leech.....	11 Grant 572; 24 U. C. R. 321.....	64, 255
Leney et al. v. Taplin.....	21 L. T. N. S. 294.....	119, 122
Lett v. Commercial Bank	24 U. C. R. 552.....	129, 130, 131, 132
Lewis v. City of Toronto.....	39 U. C. R. 343	564
Lewis v. Tudhope.....	27 C. P. 505	416

L.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Limpus v. London General Omnibus Co..	1 H. & C. 526.....	104
Lindin et ux. v. Buchanan, Re	29 U. C. R. 1	132
Lister v. Turner	5 Hare 281	66
Llado v. Morgan	23 C. P. 517	126
Loker v. Brookline	13 Pick. 343	567
Looker v. Halcomb	4 Bing. 183.....	210
Loomis et al. v. Ballard et al.	7 U. C. R. 366.....	601, 607, 608
Lopez, Ex parte, Re Lopez	L. R. 5 Ch. D. 65	447
Low v. Hicks	21 C. P. 113	9
Low v. Morrison	14 Grant 192	255
Lowel, City of, v. Spaulding	4 Cush. 277.....	566
L'Union St. Jacques de Montreal and Belisle	L. R. 6 P. C. 31.....	156
Luther v. City of Worcester	97 Mass. 268	568
Lyde v. Eastern Bengal R. W. Co.	36 Beav. 10.....	42
Lyman v. Lovekin	20 C. P. 363.....	168, 169
Lyon v. Globe Mutual Fire Ins. Co.	27 C. P. 567.....	291, 306
Lyster v. Kirkpatrick	26 U. C. R. 217.....	255

M.

Macbeth v. Smart	14 Grant 298.....	353
Mace and the Corporation of the County of Frontenac, Re	42 U. C. R. 70	360
Mackay v. Commercial Bank of New Brunswick	L. R. 5 C. P. 394	101, 110
Mackenzie v. Dunlop	3 Macq. 22	126
Maine, State of v. Inhabitants of Strong..	25 Maine 297	36
Major v. Chadwick	11 A. & E. 571.....	500
Malleable Iron Works v. Phoenix Ins. Co.	25 Conn. 465, 4 Bennett 161	293
Malloch v. Anderson	4 U. C. R. 481	36
Malone and the Corporation of the County of Grey, Re	41 U. C. R. 159.....	359, 367
Manchester v. City of Hartford	39 Conn. 118.....	566
Manners v. Boulton	6 O. S. 663	500
Mannox v. Greemer	L. R. 14 Eq. 456	27
Marshall v. Columbian Mutual Fire Ins. Co.	7 Fost. 156; 3 Bennett 634	293
Marshalsea Case	10 Co. 68.....	395
Martin v. Goble	1 Camp. 320	202
Martin v. Great Northern R. W. Co	16 C. B. 179.....	190
Martin v. Pridgeon	1 E. & E. 778.....	222, 616
Mason v. Hartford Fire Ins. Co.	29 U. C. R. 585.....	321
Mason v. Scott	22 Grant 592	609
Mason v. Thomas	23 U. C. R. 305	336
Masters v. Maddison County Mutual Fire Ins. Co.	11 Barb. 626 ; 3 Bennett 398.....	293
Mathers v. Lynch	28 U. C. R. 354.....	332, 335, 336
May v. Brown	3 B. & C. 113.....	511
May v. Buckeye Mutual Ins. Co	25 Wis. 291; 3 Am. 76; 3 Bennett 555	296
Meagher v. Home Ins. Co.	10 C. P. 313.....	290
Mechanics' Building and Saving Society v. Gore District Mutual Fire Ins. Co.	40 U. C. R. 220	182
Mellor v. Watkins	L. R. 9 Q. B. 405.....	454
Mentz v. Armenia Fire Ins. Co	21 Am. 80; 79 Penn. St. 478.....	161
Merner v. Klein	17 C. P. 287	500

NAME OF CASE CITED.	M.	WHERE REPORTED.	PAGE.
Merry v. Nickalls		L. R. 7 Ch. 733	
Meyerstein v. Barber		L. R. 2 C. P. 38	271
Michie and Corporation of the City of Toronto, Re		11 C. P. 379	84
Michie and Huron and Ontario R. W. Co., Re		26 C. P. 566	42
Miles and Corporation of the Township of Richmond, Re		28 U. C. R. 333	78, 88
Miller v. Aris		4 Esp. 231	440
Miller v. Mutual Benefit Life Ins. Co.		31 Iowa 216, 7 Am. 122	293, 294
Miller v. Tetherington		6 H. & N. 278; 7 H. & N. 954	321, 325
Mills v. McKay		15 Grant 192	214
Milne v. Leisler		7 H. & N. 786	519
Mitchell v. Brown		1 E. & E. 267	616
Mitchell v. Mitchell		27 C. P. 160	416, 440, 447
Mixer's Case		4 De G. & J. 575	106
Moliere v. Pennsylvania Fire Ins. Co.		5 Rawle 342; 1 Bennett 451	293
Molson's Bank v. McDonald		2 App. 102; 40 U. C. R. 529	604, 609
Montgomery and the Township of Raleigh, Re		21 C. L. 381	531
Montreal, Mayor of, v. Drummond		L. R. 1 App. Cas. 384	385
Moor v. Merritt		6 Grant 550	234, 237
Moore v. Rawson		3 B. & C. 332	200
Morgan v. Brown		4 A. & E. 515	222, 225
Morrison v. Belcher		3 F. & F. 614	521
Mosey v. City of Troy		61 Barb. 580	568
Mottshell and Corporation of Prince Edward		30 U. C. R. 74	615
Mountnow v. Collier		1 E. & B. 630	7, 13
Mowatt v. Londresborough		3 E. & B. 334	606
Mulholland v. Conklin		22 C. P. 372	256
Murray v. McLean		57 Ill. 378	584, 592
McBrian v. Water Commissioners for City of Ottawa		40 U. C. R. 80	178
McCabe v. McCabe		22 U. C. R. 378	9
McCulloch v. Maryland		4 Wheat. 316	616
McFaul v. Montreal Inland Ins. Co.		2 U. C. R. 59	290
McDonald v. Upper Canada Mining Co.		15 Grant 179	42
McDonell v. McDonald		24 U. C. R. 74	215
McGregor v. Currie		26 C. P. 55	352, 355
McGregor v. Elliott		20 U. C. R. 299	256
McIntosh v. Brill		20 C. P. 426	121
McIntyre v. Municipal Council of Bosanquet		11 U. C. R. 460	35, 37
McKay v. Burley		18 U. C. R. 251	554
McKinnon and Corporation of Village of Caledonia, Re		33 U. C. R. 502	84
McLaren v. Miller		20 Grant 637	232, 237
McLaughlin v. City of Corry		77 Penn. St. 109, 18 Am. 432	564, 568, 569
McLean v. Buffalo and Lake Huron R. W. Co.		23 U. C. R. 448; 24 U. C. R. 270	102, 103, 110, 112, 114
McLean v. Town Council of Town of Brantford		16 U. C. R. 348	43
McNish v. Munroe		25 C. P. 290	475

N

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Nasson v. City of Boston.....	14 Allen 508	568
National Exchange Co. of Glasgow v. Drew	2 Macq. 103	106
Neill et al. v. Whitworth	18 C. B. N. S. 435	123
New Brunswick and Canada R. W. Co. v. Coneybeare.....	9 H. L. 711.....	107
New York Central Insurance Co. v. Na- tional Protection Ins. Co.....	20 Barb. 486.....	293
Nias v. Adamson.....	3 B. & Ald. 225.....	373
Nichols v. Norris	3 B & Al. 41.....	608
Nicholson v. Guardians of Bradford Union	L. R. 1 Q. B. 620.....	43, 178
Nicholson v. Gunn	35 U. C. R. 7.....	370, 371, 372
Noker v. Gibbon.....	8 Sur. N. S. 726.....	238
Norfolk Railway Co. v. M'Namara	3 Ex. 628	606
Norman v. Thompson.....	4 Ex. 755.....	435
North v. Wakefield	13 Q. B. 536	608
North British Ins. Co. v. Lloyd.....	10 Ex. 523.....	431
North River Bank v. Aymar.....	3 Hill 262	114
Northey v. Trumenhiser.....	30 U. C. R. 426	231
Northumberland and Cobourg, Re.....	20 U. C. R. 288	384

O.

O'Halloran v. Sills.....	12 C. P. 465	134, 135, 136, 138
Oliver v. Great Western R. W. Co.....	28 C. P. 143	114
Olnstead et al. v. Smith et al.	15 U. C. R. 421.....	336
Oriental Financial Corporation v. Overend, Gurney & Co.....	L. R. 7 Ch. 142	604

P.

Palmer v. Baker.....	22 C. P. 59	17, 20
Paraguassu Steam Tramroad Co, Black & Co.'s Case	L. R. 8 Ch. 254.....	354
Parker v. Municipalities of United Town- ships of Pittsburg and Howe Island...	8 C. P. 517	80
Parmiter v. Coupland	6 M. & W. 105.....	521
Paton v. Currie.....	19 U. C. R. 390.....	500
Perry v. Corporation of Ottawa.....	23 U. C. R. 391.....	178
Persse v. Persse.....	3 Ir. Ch. 196	28
Petty v. Cooke	L. R. 6 Q. B. 790.....	605
Philadelphia, Wilmington, and Baltimore R. W. Co. v. Tingley	21 How. 202; 6 Am. Railway Cases 493.....	104
Phillip v. Bacon	9 East 298.....	598
Phillips v. Mullings.....	L. R. 7 Ch 244	64
Phillips v. Treeby	8 Jur. N. S. 711	277
Pickard v. Bretz.....	5 H. N. 9	138
Pickard v. Sears.....	6 A. & E. 469.....	15
Pickard v. Smith.....	10 C. B. N. S. 470.....	583, 591
Pim v. Municipal Council of Ontario.....	9 C. P. 302.....	42, 178
Placerville, City of v. Wilcox.....	35 Cal. 21	343
Plasters' Company v. Parish Clerks' Com- pany.....	6 Ex. 630.....	199
Pomfret v. Ricroft.....	1 Saund 32	277
Poole v. Huskinson.....	11 M. & W. 827	36
Poole v. Whitcomb.....	12 C. B. N. S. 770.....	598
Pooley v. Haradine.....	7 E. & B. 431.....	604, 605

NAME OF CASE CITED.	P. WHERE REPORTED.	PAGE.
Port Canning Land Investment Reclamation and Dock Co. v. Smith.....	L. R. 5 C. P. 114.....	123
Powell v. Simons.....	13 Am. 629.....	198
Powell v. Smith.....	L. R. 14 Eq. 85.....	171
Praed v. Hull.....	1 Sim. & Stu. 331.....	232
Preston v. Hunton.....	37 U. C. R. 177.....	17, 20, 440
Price v. Barker.....	4 E. & B. 760.....	608
Price v. Jenkins.....	L. R. 4 Ch. D. 483; L. R. 5 Ch. D. 619.....	63
Price et al. v. Moulton.....	10 C. P. 561.....	606
Prior et al. v. Wilson.....	1 C. B. N. S. 95.....	506
Proctor v. Town of Lewiston.....	25 Ill. 153.....	36
Providence, City of, v. Clapp.....	17 How. U. S. 161.....	567, 573
Public Works, Commissioners of, v. Daly et al.....	6 U. C. R. 33.....	390
Pulbrook v. Lawes.....	L. R. 1 Q. B. D. 284.....	461
Pulvertoft v. Pulvertoft.....	18 Ves. 84.....	66
Purcell v. Sowler.....	L. R. 1 C. P. D. 781.....	504
Pyer v. Carter.....	1 H. & N. 916.....	277

R.

Ralph v. Carrick.....	L. R. 5 Ch. D. 984.....	26
Ranger v. Great Western R. W. Co.....	5 H. L. 72.....	106, 107
Raphael v. Goodman.....	8 A. & E. 565.....	108
Rawson v. Johnson.....	1 East 203.....	119
Ray v. Corporation of Petrolia.....	24 C. P. 7.....	566
Redfern, Re.....	L. R. 6 Ch. D. 24.....	26
Redford v. Mutual Fire Ins. Co. of Clinton.	38 U. C. R. 538.....	293
Reed v. Inhabitants of Northfield.....	13 Pick. 94.....	574
Rees v. Berrington.....	2 W. & T. L. C. 5th ed. 992.....	604
Reeve v. Wood.....	5 B. & S. 364.....	243
Reiffenstein v. Hooper, et al.....	36 U. C. R. 295.....	442
Renshaw v. Bean.....	18 Q. B. 112.....	196, 203, 204
Reuter v. Electric Telegraph Co.....	6 E. & B. 341.....	42
Reynolds v. Williamson.....	25 C. P. 49.....	135, 139, 141
Regina v. Arnould.....	8 E. & B. 559.....	486
Regina v. Chandler.....	1 Dears. 453.....	244, 245
Regina v. Cooper.....	2 C. & K. 876.....	244, 245
Regina v. Cridland.....	7 E. & B. 853.....	225
Regina v. Bertrand.....	L. R. 1 P. C. 520.....	395
Regina v. Boardman.....	30 U. C. R. 553.....	157, 616, 617
Regina v. Buffalo & Lake Huron R. W. Co.	23 U. C. R. 208.....	383, 386, 388
Regina v. Davidson.....	21 U. C. R. 41.....	405
Regina v. Dean.....	12 M. & W. 39.....	222, 225
Regina v. Debores.....	L. R. 1 Q. B. D. 252.....	245
Regina v. Denham.....	35 U. C. R. 503.....	616
Regina v. Downs.....	L. R. 1 Q. B. D. 25.....	244
Regina v. Farrer.....	L. R. 1 Q. B., 558.....	486, 490
Regina v. Fick.....	16 C. P. 379.....	500
Regina v. Gowan.....	7 C. P. 136.....	506
Regina v. Gray.....	1 E. & A. 501.....	504
Regina v. Heanor.....	6 Q. B. 745.....	486
Regina v. Hogan.....	2 Den. C. C. 277.....	244
Regina v. Hoggard.....	30 U. C. R. 152.....	617
Regina v. Inhabitants of Cartworth.....	5 Q. B. 201.....	207
Regina v. Inhabitants of Darton.....	2 D. & L. 492.....	207

R.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Regina v. Inhabitants of Gilberdike.....	5 Q. B. 207.....	207
Regina v. Lake.....	7 P. R.....	227
Regina v. Littlechild.....	L. R. 6 Q. B. 293.....	225
Regina v. Moylan.....	19 U. C. R. 521.....	506
Regina v. McKale.....	L. R. 1 C. C. 125.....	211
Regina v. Newman.....	1 E. & B. 268.....	499, 506
Regina v. Phillpot.....	1 Dears. 177.....	244, 245
Regina v. Plummer.....	1 C. & K. 601.....	243, 246
Regina v. Plunkett.....	21 U. C. R. 536.....	35
Regina v. Port Perry and Port Whitby R. W. Co.....	38 U. C. R. 431.....	505
Regina v. Prince.....	L. R. 1 C. C. 150.....	211
Regina v. Rugg.....	12 Cox 16.....	245
Regina v. Ryall.....	L. R. 1 C. C. 99.....	244
Regina v. Ryland.....	L. R. 1 C. C. 99.....	246
Regina v. Shropshire Union R. W. Co....	L. R. 8 Q. B. 420.....	102
Regina v. Snider.....	23 C. P. 330.....	226
Regina v. Strachan.....	20 C. P. 182.....	222
Regina v. Sullivan.....	15 U. C. R. 198.....	393
Regina v. Taylor.....	36 U. C. R. 183.....	615
Regina v. Trafford.....	5 E. & B. 967.....	486
Regina v. Wagstaffe.....	10 Cox 530.....	245
Regina v. Wilkinson.....	41 U. C. R. 1.....	492
Regina v. Wilts.....	8 Dowl. P. C. 717.....	486
Regina v. Wismer.....	6 U. C. R. 293.....	35, 36
Rex v. Bleasdale.....	4 T. R. 809.....	222
Rex v. Charlotte Smith.....	10 Cox 94.....	245
Rex v. Clark.....	2 Cowp. 610.....	222, 224, 226
Rex v. Cook.....	3 T. R. 519.....	405
Rex v. Crofts.....	2 Stra. 1120.....	463, 465
Rex v. Friend and Wife.....	Russ. & Ry. 20.....	244
Rex v. Gough.....	2 Doug. 789.....	499, 502
Rex v. Grant et al.....	3 N. & M. 106.....	500
Rex v. Hogan.....	2 Dears. 277.....	245
Rex v. Holt.....	5 T. R. 436.....	498, 499, 500, 501, 503
Rex v. Hube.....	5 T. R. 542.....	226
Rex v. Lambert et al.....	2 Camp. 398.....	510, 511, 518
Rex v. Lloyd.....	1 Camp. 260.....	36
Rex v. Morris.....	2 Burr. 1189.....	499, 502, 503
Rex v. Nottingham.....	4 East. 208.....	535
Rex v. Ridley.....	2 Camp. 650.....	244
Rex v. Stokes.....	8 C. & P. 153.....	245
Rex v. Teal.....	11 East 307.....	503
Rex v. Tucker.....	14 Burr. 2046.....	224
Rex v. Waddington.....	1 East 143.....	498, 503
Rex v. Weston.....	1 Strange 623.....	224
Rhys v. Dare Valley R. W. Co.....	L. R. 19 Eq. 93; 23 W. R. 231	383, 389
Richards v. Richards.....	15 East 294.....	292
Richmondville Union Seminary v. Hamil- ton Mutual Ins. Co.....	14 Gray 459.....	292
Right d. Green v. Proctor.....	Burr. 2208.....	27
Riley v. Spottiswood.....	23 C. P. 318.....	128
Ringland v. Corporation of Toronto.....	23 C. P. 93.....	560, 563, 564, 567, 572
Rixon v. Emery.....	L. R. 3 C. P. 546.....	442
Roberts v. Kerr.....	1 Camp. 262.....	36
Roberts v. Snell.....	1 M. & G. 577.....	8

NAME OF CASE CITED.	R,	WHERE REPORTED	PAGE.
Robertson v. Bannerman	17	U. C. R. 508	8, 13
Robertson v. Clarke.....		1 Bing. 445.....	319
Robertson v. Glass.....	20	C. P. 250	168, 169
Robertson v. Slattery	10	U. C. R. 498	454
Robertson v. Steadman.....	3	pugs. 621.....	156
Robertson v. Watson	27	C. P. 598	111
Robinson v. Mollett.....		L. R. 7 H. L. 802.....	111
Robinson v. Smith.....	17	U. C. R. 218.....	454
Roddy v. Lester.....	14	U. C. R. 259.....	383, 384
Rodger v. Comptoir d'Escompte de Paris.		L. R. 2 C. P. 393.....	270, 273
Rodwell v. Phillips.....		9 M. & W. 501.....	131
Roe v. Smith	15	Grant 344.....	53
Rooney v. Lyon	40	U. C. R. 366; 2 App. 53....	370, 416
Roper v. London		1 E. & E. 825.....	148, 160
Rosher v. Williams... ..		L. R. 20 Eq. 210.....	64
Routledge v. Grant.....		4 Bing. 653.....	120
Rowe v. London & Lancashire Fire Ins. Co	12	Grant 311.....	298
Rowley v. Empire Fire Ins. Co.....	36	N. Y. 550.....	293
Royal British Bank v. Turquand.....		5 E. & B. 248.....	178
Royal Canadian Bank v. Grand Trunk R. W. Co.....	23	C. P. 225	95
Royal Canadian Bank v. Great Western R. W. Co.....	23	C. P. 225	103
Rutherford v. Eakins.....		26 C. P. 55	416
Ryerson v. Abington	102	Mass. 526	564
Rylan DeLisle.....		L. R. 3 P. C. 17.....	354

S.

Sadler v. Jackson.....	15 Ves.	52.....	440
Saulter v. Carruthers	9 U. C. L. J.	158	136, 138
Savage v. Bangor.....	40 Maine	176.....	567
Scarman v. Castell.....	1 Esp.	270.....	245
Schooner "Reeside," The.....	2 Sumn.	567	126
Scott v. Avery.....	5 H. L.	811	149, 160
Scott v. Dent.....	38 U. C. R.	30	584
Scouler v. Scouler	8 C. P.	9.....	27
Secord and County of Lincoln, Re.....	24 U. C. R.	142	346, 347
Setteridge v. Winter	1 Camp.	262.....	36
Severn v. Severn	3 Grant	431; 1 Grant 109....	243, 246
Sexton et al. v. Montgomery County Mutual Ins. Co.....	9 Barb.	191.....	292
Seymour v. Maddox.....	16 Q. B.	326.....	583, 588
Shannon v. Gore District Mutual Fire Ins. Co.....	37 U. C. R.	380; 40 U. C. R. 188.	284, 289, 296
Shannon v. Hastings Mutual Fire Ins. Co.	25 C. P.	470; 26 C. P. 380....	290, 296
Sharp v. Powell	L. R. 7. C. P.	253	569
Sharpe v. Gibbs.....	16 C. B. N. S.	527.....	601, 607
Shaver, Re	3 Ch. Chamb.	379	9
Shaw v. Massie	21 C. P.	266	436
Shea et ux. v. City of Lowell.....	8 Allen	136.....	566
Shepherd v. Midland R. W. Co	25 L. T. N. S.	879.....	569
Shoebottom v. Egerton	18 L. T. N. S.	364.....	583
Sibley's Trusts, Re	L. R. 5 Ch. D.	494.....	26
Simonds v. White.....	2 B. & C.	805	320
Simpson v. Westminster Palace Hotel Co.	8 H. L. C.	712.....	42, 45

S.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Sinclair v. Canadian Mutual Fire Ins. Co.	49 U. C. R. 206.....	294, 297
Smith v. Hamilton.....	29 U. C. R. 394.....	584
Smith v. Hughes.....	L. R. 6 Q. B. 597.....	430
Smith v. Mutual Ins. Co. of Clinton.....	27 C. P. 441.....	291, 306
Southcote v. Stanley.....	1 H. & N. 247.....	588
South Wales R. W. Co. v. Redmond.....	10 C. B. N. S. 675.....	42
Speakman, Re.....	L. R. 4 Ch. D. 620.....	25, 26
Spooner v. Western Ass. Co.....	38 U. C. R. 62.....	319, 324
Squire v. Campbell.....	1 M. & Cr. 459.....	277
Staigh v. Burn.....	L. R. 5 Ch. 163.....	201
Stanley v. Dowdwell.....	L. R. 10 C. P. 102.....	121
Stanton v. Springfield.....	12 Allen 566.....	563, 568
State Board of Agriculture v. Citizens Street R. W. Co.....	17 Am. 702.....	46
St. Catharines, Thorold and Suspension Bridge Road Co. v. Gardner.....	21 C. P. 190.....	488
Stern v. Beck.....	8 L. T. N. S. 588; 8 L. J. N. S. 588	231, 232
Stewart v. Murphy.....	16 U. C. R. 244.....	255
Stewart v. West India & Pacific Steamship Co.....	L. R. 8 Q. B. 88.....	319, 327
Stewart v. Woodstock & Huron Plank and Gravel Road Co.....	15 U. C. R. 427.....	570
St. John v. St. John.....	Hob. 78.....	555
Stone v. Inhabitants of Hubbardton.....	100 Mass. 49.....	568
Storms v. Canada Farmers Mutual Ins. Co.	22 C. P. 75.....	290
Stratton v. Staples.....	59 Maine 94.....	584
Street et ux. v. Inhabitants of Holyoke.....	105 Mass. 82; 7 Am. 500.....	568
Strong v. Foster.....	17 C. B. 201.....	605
Sturgeon v. Wingfield.....	15 M. & W. 224.....	14
Sullivan v. Waters.....	14 Ir. C. L. 460.....	584
Sweeney v. O. C. N. & R. Co.....	10 Allen 368.....	584
Swift v. Jewsbury.....	L. R. 9 Q. B. 301.....	94, 95, 109
Swift v. Winterbotham.....	L. R. 8 Q. B. 244.....	94, 109, 110
Swire v. Francis.....	37 L. T. N. T. 554.....	115

T.

Tabart v. Tipper.....	1 Camp. 350.....	510
Tarpley v. Blabey.....	2 Bing. N. C. 437.....	511
Taunton v. Royal Ins. Co.....	2 H. & M. 135.....	42
Taylor v. Burgess.....	5 H. & N. 1.....	604, 605
Taylor v. Chichester and Midhurst R. W. Co.....	L. R. 2 Ex. 356.....	45
Taylor v. Merchants' Fire Ins. Co.....	9 How. 390.....	120
Taylor v. Peterborough, Cobourg and Marmora R. W. Co. and Mining Co....	24 C. P. 200.....	42
Teasdale v. Braithwaite.....	L. R. 4 Ch. D. 685; L. R. 5 Ch. D. 630.....	63
Tebbutt v. Bristol and Exeter R. W. Co..	L. R. 6 Q. B. 73.....	104
Templeman v. Haydon.....	12 C. B. 507.....	584
Tench v. Great Western R. W. Co.....	33 U. C. R. 8.....	105
Terry v. Hutchinson.....	L. R. 3 Q. B. 599.....	554
Thomas v. Alsop.....	L. R. 5 Q. B. 15.....	244, 246, 247
Thompson v. Bell.....	10 Ex. 10.....	98
Thompson v. Hudson.....	L. R. 4 H. L. 1.....	232
Thompson v. Rutherford.....	27 U. C. R. 205.....	18

T.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Thompson v. Webster	4 DeG. & J. 600.....	63
Thorne v. Barwick.....	16 C. P. 368	120, 121
Thornton v. Stephen	2 M. & R. 45.....	511, 518
Thorogood v. Robinson.....	6 Q. B. 769.....	454, 455
Tighe v. Tighe	L. R. 11 Ir. Eq. 207.....	111
Tigress, The	8 L. T. N. S. 117; 11 W. R. 528..	270
Tilton v. McKay.....	24 C. P. 94.....	53
Titus v. Durkee	12 C. P. 367.....	605
Tome v. Parkersburgh R. W. Co.....	17 Am. 540.....	114
Tompkinson v. Russell	9 Price 287.....	131
Toogood v. Spyring.....	4 Tyrw. 582	505
Toomey v. London, Brighton and South Coast R. W. Co.....	C. B. N. S. 146.....	588
Toronto, Corporation of v. McBride....	29 U. C. R. 13	169
Townsend v. Toker.....	L. R. 1 Ch. 446	63
Townshend v. Windham.....	2 Ves. Sr. 1	66
Tredwen v. Holman.....	1 H. & C. 72.....	148, 160
Tripp v. Lyman	37 Maine 250	567
Trumpour v. Saylor....	1 App. 100	584
Trust and Loan Co. v. Drennan.....	16 C. P. 321 ..	231
Tucker Manufacturing Co. v. Fairbanks..	98 Mass. 101.....	167, 169
Turnbutl v. Bird.....	2 F. & F. 508.....	505, 521
Turner v. Wilson.....	23 C. P. 87.....	291
Tyler v. Ætna Fire Ins. Co.....	12 Wend. N. Y. 507.....	292

U.

Udell v. Atherton.....	7 H. & N. 172	100, 108, 10
Uhde v. Walters.....	3 Camp. 16.....	319
Union Bank of Manchester v. Beech....	12 L. T. N. S. 499	608
United Land Co. v. Great Eastern R. W. Co.	L. R. 10 Ch. 586	277
Universal Non-Tariff Fire Ins. Co., Re v. Forbes' & Co.'s Claim	L. R. 19 Eq. 485	296, 304

V.

Valentine v. Smith.....	9 C. P. 59	336
Valieri v. Boyland.....	L. R. 1 C. P. 182	95
Van Hasselt et al. v. Sack et al	13 Moore P. C. 185	102
Van Slyke v. Trenpealean County Farm- er's Mutual Fire Ins. Co.	20 Am. 50	393
Vanzant v. Burke.....	28 U. C. R. 104	389
Veale's Trusts, Re	L. R. 5 Ch. D. 622.....	26

W.

Waddington v. Bristow	2 B. & P. 452	131
Wadling v. Oliphant.....	L. R. 1 Q. B. D. 145	370, 377
Wake v. Harrop	6 H. & N. 768 ; 1 H. & C. 202.....	167, 170
Walbridge v. Gilmour.....	22 C. P. 35.....	256
Walker v. Niles	18 Grant 210.....	134, 135, 136, 138
Wall v. Home Ins. Co	39 N. Y. 157.....	290
Walton v. Waterhouse.....	2 Wms. Saund., ed. 1871, 826, note (1)	7, 12
Wardle v. Brockhurst	1 E. & E. 1058	277
Watson v. Arundell	L. R. 11 Ir. Eq. 53.....	25
Watson v. Northern R. W. Co.....	23 U. C. R. 98	593

W.

NAME OF CASE CITED.	WHERE REPORTED.	PAGE.
Watts v. Ainsworth.....	1 H. & W. 83.....	120
Watts v. Fraser	1 M. & R. 449; 7 C. P. 369; 7 A. & E. 223	511
Webb v. Commissioners of Herne Bay...	L. R. 5 Q. B. 642.....	178
Webb v. Sharman	34 U. C. R. 410.....	118, 119, 122
Webb v. Ward.....	7 T. R. 296.....	373, 376
Weld v. Baxter.....	11 Ex. 816; Ex. Ch. 1 H. & N. 568.....	7, 13
Wellington v. Chard.	22 C. P. 518	371
Westacott v. Powell.....	2 E. & A. 525.....	553
Western Bank of Scotland v. Addie	L. R. 1 S. C. App. 145....	98, 108, 110
Wheat et al. v. Cross.....	1 Am. 28.....	120
Wheulton v. Hardisty	8 E. & B. 232	100
Whitehead v. Anderson.....	9 M. & W. 478.....	269, 270
Whitehead v. Buffalo and Lake Huron R. W. Co.....	7 Grant 351.....	42
Whitehead v. Smithers	L. R. 2 C. P. D. 553	616
Whitehouse v. Hemmant.....	27 L. J. Ex. 295.....	513
Whiteley v. Pepper	L. R. 2 Q. B. D. 276	591
Whitney Arms Co. v. Barlow.....	20 Am. 504.....	46
Widder v. Buffalo & Lake Huron R. W. Co.	24 U. C. R. 520; 27 U. C. R. 425	383, 388
Wigglesworth v. Dallison	1 Smith's L. C. 7th ed. 598....	119, 126, 321
Wilby v. West Cornwell R. W. Co.	2 H. & N. 703.....	42
Wilkinson v. Fairrie	1 H. & C. 633.....	583, 589
Willats v. Busby.....	5 Beav. 193.....	63
Williams A. Adams.....	2 B. & S. 312	486
Willing v. Currie	36 U. C. R. 46	119, 121
Willis v. DeCastro	4 C. B. N. S. 216	608
Wilmot v. Wadsworth et al.....	10 U. C. R. 594	124
Wilson's Case.....	Cro. Eliz. 601.....	402
Wilson v. Bank of Victoria.....	L. R. 2 Q. B. 203.....	325
Wilson v. Breslaner.....	L. R. 2 C. P. D. 314	18, 20
Wilson et ux. v. City of Charlestown.....	8 Allen 137.....	564, 574
Wilson v. Fuller.....	3 Q. B. 1009.....	100
Wilson v. Townend	6 Jur. N. S. 1109.....	203
Wilson v. Wilson	8 C. P. 525	62
Winnall v. Adney.....	3 B. & P. 247	245
Wilton v. Berkley.....	2 Plow. 123.....	405
Wood v. McAlpine.....	1 App. 234	185
Woodley et al. v. Coventry et al.....	2 H. & C. 164.....	102
Woodruff v. Corporation of the Town of Peterborough	22 U. C. R. 274	354
Woodruff v. Walling.....	12 U. C. R. 501.....	53
Wright v. Doe d. Tatham.....	4 Bing. N. C. 489.....	504, 509
Wyke v. Rogers	1 DeG. McN. & G. 408....	609, 610, 611
Wyld v. Liverpool, London and Globe Ins. Co.....	23 Grant 442.....	293

Y.

Yates v. Jack	L. R. 1 Ch. 295.....	201
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Z.

Zoebissh v. Tarbell	10 Allen 385.....	584
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REPORTS OF CASES

IN THE

COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 41 VICTORIA, 1877.

From November 19th to December 8th.

Present :

THE HON. ROBERT ALEXANDER HARRISON, C. J.

“ “ ADAM WILSON, J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ JOHN DOUGLAS ARMOUR, J. (*a*)

MARY PATTERSON V. SMITH.

Landlord and tenant—Estoppel.

One H., a widow, having possession of the land in question, but no other title, leased it to defendant on the terms, as stated by defendant (there being no writing), that he was to give her \$60 a year as long as she lived, and then to do the best he could with the heirs of her husband, to whom it belonged, she having in fact no title. In an action by the plaintiff claiming under the will of H., and as assignee of her heir-at-law, for rent due after H.'s death: *Held*, that the defendant was not estopped from shewing that H.'s title determined at her death, and that she claimed and professed to give him no greater title.

The defendant under a judgment and execution recovered by him against P., the heir-at-law of H., had P.'s interest in this land put up for sale by the sheriff, when the plaintiff purchased, and paid the purchase money. *Held*, that the defendant was precluded from disputing the plaintiff's title derived under such sale.

DECLARATION. First count: that Elizabeth Hartley being seized in fee of a messuage and lands, let the same to defendant as her tenant at the rent of \$60 per annum,

(*a*) During this term JOHN DOUGLAS ARMOUR, Esquire, one of Her Majesty's counsel, learned in the law, was appointed a puisne justice of this Court, in the place of MORRISON, J., appointed a Judge of the Court of Appeal.

who entered thereon : that Elizabeth Hartley died, and her reversion in the demised premises descended to Alexander Patterson, her heir-at-law : that he afterwards, and during the term, by deed granted and conveyed the messuage and lands in fee, and the rents then due, owing and payable to him by the defendant in respect of the said premises, to William C. Sawers ; and he afterwards, and during the said term, by deed granted and conveyed the said premises in fee and the rents then due, owing and payable to him by the defendant in respect of the said premises, and under the said assignment from Alexander Patterson, to the plaintiff, of which rent there are now six years due and unpaid.

Second count : claiming the reversion of Elizabeth Hartley in the said demised premises by devise from her to the plaintiff, and alleging that six years' rent under the demise had become due and payable to the plaintiff.

Third count : alleging that the reversion of Elizabeth Hartley in the lands, which descended upon Alexander Patterson as her heir-at-law, was taken in execution by the sheriff of the county of Peterborough under a writ of *fiery facias* against the lands of the said Alexander Patterson, issued upon a judgment obtained in the County Court of the County of Peterborough against him, and was sold and conveyed by the sheriff to the plaintiff ; and although six years' rent of the demised premises had become due and payable by the defendant to the plaintiff, the defendant had not paid the same.

Fourth : common counts.

Pleas : one, five, and seven, to first, second, and third counts : that Elizabeth Hartley was not seised in fee.

Second and eighth, to first and third counts : that the reversion of Elizabeth Hartley did not descend to Alexander Patterson.

Third, to first count : that Alexander Patterson did not grant or convey to William C. Sawers.

Fourth, to first count : that Sawers did not grant or convey to the plaintiff.

Sixth, to second count : that Elizabeth Hartley did not devise to the plaintiff.

Ninth, to third count: that the supposed reversion of Alexander Patterson was not taken in execution, or sold or conveyed to the plaintiff by the sheriff, as alleged.

Tenth, to the whole declaration: never indebted.

Eleventh: payment.

Twelfth, to each of the first, second, and third counts: that during the terms in these counts mentioned, and before the rents became due, the plaintiff, without the consent and against the will of the defendant, wrongfully entered into and upon the said messuage and premises, and evicted the defendant from the possession, use, and occupation thereof, and kept him so evicted from thence hitherto.

Issue.

The cause was tried at Peterborough, at the last Spring Assizes, before Burton, J., without a jury, who nonsuited the plaintiff.

The evidence was to the following effect:—

Alexander Patterson, the husband of the plaintiff and the son and heir at-law of Mrs. Hartley, said: that one Sheppard occupied the store near the tavern which Mrs. Hartley kept, as her tenant, and when he left the defendant came into the possession of the same store. He heard the defendant ask Mrs. Hartley, if she was going to let him have the place on the same condition as Sheppard had it—that is, at the rate of \$60 a year, and to pay every half-year. She said she would. He was to have it for five years: no writings drawn. After that bargain Smith went into possession of the store. Mrs. Hartley lived for some time after that: she died six years ago last fall. The lease was made eight or nine years ago. Defendant has had possession ever since. He occupies the store Sheppard had and the little granary on the other side of the street. He has paid no rent since Mrs. Hartley's death. He made a statement after her death that if he knew who he had to pay the rent to he would pay it. Smith sued him (the witness) since Mrs. Hartley's death, and got a judgment against him. Sheppard, when he left, sold out his goods to the defendant. At the time of the sheriff's sale the witness was in possession of another part of the same lots.

Mary Patterson, the plaintiff, said : The defendant occupied, under Mrs. Hartley, the same premises which Sheppard had. They were lots 9 and 7. Lot 7 is on the south side of Peterborough street, and lot 9 on the north side of it. It was the west portion of lot 9 that he occupied. There were two buildings on number 9. They are two corner lots. The little storehouse is across the street from the store. The old stable is directly across the road from the tavern. The two stables are on lot 7. She also said, "I think I have seen Mrs. Hartley go and get goods at Mr. Smith's store, and she would tell him to charge them to her on the rent."

John Pettigrew said : Mrs. Hartley and her husband, Robert Hartley, both occupied the premises as man and wife : he died before her. The witness did not know which of them owned the premises. He heard her say several times the property was Hartley's.

The defendant's examination was put in. It was as follows, so far as it was material :—I knew Mrs. Hartley. I went into a store on her premises in Norwood about eleven years ago last January, partly tenant and partly purchaser. I did not think she was the owner ; she did not claim to be. My former employer, Mr. Sheppard, was in possession previous as tenant under Mrs. Hartley. I was to pay her \$60 a year as long as she lived ; after that I was to hold possession against her husband's heirs : no writing to that effect. There was no witness present when the bargain was made. Mrs. Hartley lived about five years after it, and I paid her rent during that time at the rate of \$60 a year. I was to have the premises that Sheppard had until her death, and then I was to have the hotel in addition. Mrs. Hartley said I was to keep the Hartleys out of it. I know Alexander Patterson, the plaintiff's husband. I believe he was Mrs. Hartley's son. I sued him for a debt. I recovered a judgment against him. I issued an execution against his lands, and caused them to be sold under that execution. His farm was seized. I was told by my attorney that the interest of Alexander Patterson in the

premises leased by me from Mrs. Hartley was seized and sold under the execution. I was present at the sale. The sale was to the plaintiff. At the trial referred to I set up that I was owner of the premises. I never collected any rent from the hotel since Mrs. Hartley's death. Alexander Patterson, after her death, asked me for liberty to rent it to James McKelvey. I did not tell Patterson I was the owner or had any right to it. I never asked him for any rent. I gave it to him as a privilege. I never asked any one for rent since. The same man is in it yet. Patterson and his wife, I suppose, collect the rents of the tavern. I never disputed their title since. There was no particular amount of land specified in the lease: I have the same that Sheppard had. Mrs. Hartley never turned me out of possession of the land I got from her, nor the plaintiff, nor any person. I have paid no rent since Mrs. Hartley's death. Alexander Patterson's tenant was in possession of part of the premises. I never gave any thought that Patterson had any interest in the premises. My attorney and myself were present at the sale.

For the defence, the defendant was sworn, and said: The terms on which I took possession of Mrs. Hartley's store were, that I was to give her \$60 a year while she lived, and at her death I was to have it and do the best I could with Robert Hartley's heirs. She gave me up the deed of the lots; she gave me up the deed that Robert Hartley had at the time. There was nothing said of a five years' lease. That was the only bargain I ever made with her about the property. Sheppard was the tenant of Mrs. Hartley. I bought out his store. She did not claim any right after his death. She expected Hartley's heirs to come along and she did not put anything on it. There never was any agreement made in the presence of Patterson. I was to stand in the same relation with regard to the tavern after her death as to the store. I told Patterson dozens of times that I claimed right to the tavern. I do not know that I ever told him directly that I had rights to it. I told him that he took it with the same understanding that I

did when he asked the privilege of renting it. Mrs. Hartley gave me the old deed of the place six or nine months before her death, to keep for myself. I knew she did not claim to have any particular right to the property.

J. A. Butterfield said : I knew Mrs. Hartley ; I drew her will. I stopped there for instructions. She told me what she wanted done with the farm and her personal property. I then asked her what about the place that Smith is in and the tavern. She said, "I have only a life-right in them : when I am dead, Smith may hold the store, and they may fight over the tavern stand if they have a mind to." That was said a day or two before I drew the will. She said she had only a life-interest in them : that she would leave Smith in possession of the store, and as to the other part, the Hartleys might fight over it. Some time after that she told me she had given the deeds of the Norwood property to Smith. She told me at the time that she intended that Smith should have it. She did not pretend to convey it. It was not her property. I do not know that any more than is currently known throughout the village. I drew the will at my office and took it to her to read it. The witnesses were present when it was read.

P. M. Grover said : I had a conversation with Mrs. Hartley before her death about the Smith property. She said that she had given the property at the corner to Smith, and had handed him the deed. I have talked to her of this same property for twenty years. She said that Smith was paying her \$60 a year as long as she lived, and after that he was to have it if he could keep it from Hartley's heirs. She was expecting every year in the early part of her widowhood that she would be put out by Hartley's heirs. She supposed that Smith would have to give up the deed if any one could prove a better title than he could.

In reply, *John Pettigrew*, said : Mrs. Patterson came for him to be present at the time of her mother's will, and the witness and Calder went down to Mrs. Hartley's : that Mrs. Hartley said she would like Mr. Butterfield to

draw her will. He was sent for, and came with a book, and began to write under her instructions then and there. She said she wanted her property put so that her son could not dispose of it.

Alexander Patterson denied having asked the defendant for the privilege of renting the tavern.

The defendant, in his examination before the trial, stated that he received a cheque after the sale, but never cashed it, and never received any money on account of it.

In Easter term, May 22, 1877, *Armour*, Q. C., obtained a rule calling on the defendant to shew cause why the nonsuit should not be set aside and a verdict be entered for the plaintiff, and for damages to the amount of rent found to be due by the defendant.

In the same term, June 7, 1877, *Robinson*, Q. C., shewed cause. The notes of the learned Judge being lost, there is no minute of his opinion or finding, excepting the mere result that a nonsuit was entered. *Elizabeth Hartley* had no title. She had a right to dower out of the property in question, but the dower was never assigned to her, and she continued in possession of the whole of the property after her husband's death until her own death. She never claimed more than a life-estate in it. She told that to the defendant and to several others, and she made all her arrangements with respect to it under that view and impression and assertion of her rights. The defendant was not bound, therefore, to give up possession to any one after her death—although he got the possession from her—because her estate was then determined; and he is at liberty to shew that fact. The following authorities shew that although there may be a *prima facie* presumption of the lessor having a fee simple estate when he make a demise, the tenant may shew that the lessor had not in fact such an estate—in an action by the devisee of the supposed reversion in fee for rent under the covenant for payment of it to the lessor, "his heirs and assigns": *Mountnoy v. Collier*, 1 E. & B. 630; *Weld v. Baxter*, 11 Ex. 816, and in the Ex. Ch. 1 H. & N. 568; *Walton v.*

Waterhouse, 2 Wms. Saund., ed. 1871, 826, note (1); *Bigelow* on Estoppel, 2nd ed., 392 The will of Elizabeth Hartley passed no interest in the property to the plaintiff as the devisee, because Elizabeth Hartley had no interest to devise. The property in question can pass, if at all, only under the words, "I give and bequeath the rest and residue of my estate, personal and mixed, of which I shall be seized and possessed, or to which I may be entitled at the time of my death, to Mary Patterson, wife of my son Alexander Patterson, to have and to hold the same to her and her heirs, executors, administrators, and assigns, to her and their use and behoof for ever;" and the land out of which this rent is claimed is neither *personal* property nor *mixed* property, but *real* property, which is a distinct kind of property from either of the two named classes. If the will shew clearly that land was intended to be devised, it will pass under the name of *personal* estate: *Doe d. Topfield v. Topfield*, 11 East 246. There can be no estoppel here. There is no necessity for it, and it does not arise. The defendant is not disputing Mrs. Hartley's title; he is only shewing what that title was, and that it has determined. It is not denied that mere possession of land is an interest which may be devised: *Asher v. Whitlock*, L. R. 1 Q. B. 1. But that does not prevent the defendant from shewing what the estate was in respect of which possession was held.

Armour, Q. C., supported the rule. It is not contended that a tenant cannot shew his landlord's title has ended. But it is contended that the defendant has admitted that Mrs. Hartley's interest was a fee simple interest by accepting a lease from her, and that she had a good devisable or descendable reversion in fee: *Cuthbertson v. Irving*, 4 H. & N. 742; affirmed in Ex. Ch. 6 H. & N. 135; *Findley v. Pedan*, 26 C. P. 483; *Bliss v. Collins*, 5 B. & Al. 876; *Roberts v. Snell*, 1 M. & G. 577; *Hare v. Proudfoot*, 6 O. S. 617; *Doe d. Daniell v. Woodroffe*, 10 M. & W. 608, 631; *Christie v. Clarke*, 16 C. P. 544; *Robertson v. Bannerman*, 17 U. C. R. 508. The deed under the first count, which misdescribed the land, should have been reformed at

the trial, as it was a mere mistake: *Brown v. Blackwell*, 35 U. C. R. 239. As to the second count, a good title by devise is shewn, because Elizabeth Hartley had a devisable and continuing reversionary interest, and because the passage before mentioned of the general devise of "the rest and residue of my estate," is sufficient without the other words "personal and mixed"; and because these words, if held to qualify the words "the rest and residue of my estate," if there had been nothing further, cannot have that qualifying effect when it is declared afterwards that such estate is such as the testatrix was "*seized* and possessed of, to which I am entitled at the time of my death"; and that the devisee was "to have and to hold the same to her and *her heirs* * * to her and *their* use and behoof *for ever*": *Jarman on Wills*, 3rd ed., 681; *McCabe v. McCabe*, 22 U. C. R. 378; *Campbell v. Campbell*, 14 U. C. R. 17. The third count was fully proved at the trial, and as the defendant seized the land in question under his judgment and execution against the plaintiff's husband, and had it sold under his execution as the property of her husband, and was present at the sale and received the money under it, he cannot be allowed now to deny the plaintiff's title by the purchase which she then made under his execution and by his order and consent, and after he has received her money for the land: *Re Shaver*, 3 Ch. Chamb. 379; *Doe d. Harley v. McManus*, 1 U. C. R. 141. The learned Judge at the trial was of opinion it was necessary for the plaintiff to prove the judgment and execution under which the sheriff sold at the trial, to sustain the sheriff's deed; but the case of *Low v. Hicks*, 21 C. P. 113, shews that it is sufficient, as was done here, to produce the sheriff's deed reciting all these facts, and here too the defendant was the person whose writ was recited and who authorized the sale: *Taylor on Evidence*, 6th ed., p. 1505. The plaintiff is entitled to a verdict upon all of these counts.

November 19, 1877. WILSON, J.—The evidence seemed to shew, upon the whole, that the demise which was made
2—VOL. XLII U.C.R.

by Mrs. Hartley to the defendant was for her lifetime. Alexander Patterson says it was for five years, but the whole facts of the case shew, in my opinion, that that was not the agreement.

Mrs. Hartley had in truth no estate in or ownership of the land. She had declared frequently that she held the place only for her life. She gave the defendant the possession of the deed of the land, which had been made to her husband; and she said that after her death the defendant and the Hartley heirs might fight out the matter between them.

It is clear, as a matter of fact, that Elizabeth Hartley had not an estate in fee simple in the property in question. Her husband had the title in him by deed, and when he died the legal estate passed to his heir-at-law. Who he was we do not know.

After the death of her husband, she continued in the possession of the property. She did not claim any title from or through him by deed, devise, or descent. The title, therefore, on his death passed to his heir-at-law. Having thus shewn the origin of her own title, she had no other estate than that which mere occupancy gave her after her husband's death: *Doe d. Carter v. Barnard*, 13 Q. B. 945.

Being in possession, then, from and after her husband's death, she dealt with the property as her own, by demising it and receiving the rent of it while she lived.

There is also a great deal of positive testimony that she never claimed the property as her own absolutely, but, at the most, for her life, and that she said it would then go to the heirs of her husband—the Hartley heirs—and that she also said the defendant might have it for her life, and then fight it out with the Hartley heirs; or, that after her death the defendant should then try to keep it from the Hartley heirs; and the fact that she gave to the defendant the possession of the deed to her husband of the property is strong corroborative evidence of the truth of these declarations. The fact, also, that she made no specific devise of

this property, or of the tavern in which she lived with her husband until his death, and after that until her own death, and both of which places were her husband's property, held by him by one title, and held by her after his death by the same right of possession only, is strong proof that the evidence given on the trial, that she claimed no greater title than for her life, and that she then left it to be contested for by the defendant, or by somebody, with the Hartley heirs, was true, because it was just what she had time and again declared ; and these declarations of title are admissible against her. They were, therefore, properly received at the trial, unless there is some rule which excluded the defendant from proving them.

The fact as to her title, in truth, as it was, should also have been received at the trial, whether she had ever made any declaration with respect to it or not, unless there is, as before stated, some rule of law which prevented the defendant from giving it.

The plaintiff says there is such a rule applicable to the defendant, who was the tenant for years of Elizabeth Hartley, which prevented him from denying, by reason of his accepting such tenancy, that Mrs. Hartley, his lessor, was seized in fee of the land at the time when she demised it to him.

The defendant denies that, and contends that he is permitted to shew that the estate she had, or pretended to have, was, by her death, or before the commencement of the suit, determined in law ; and that upon her death he was entitled to shew that she never had any legal title, or any title other than the mere possession, which she had got after her husband's death, and which had not lasted for a period long enough to extinguish the title of the true owner.

Leaving aside for the present any question how far the defendant—by selling the estate of Alexander Patterson under the judgment and execution he had against Patterson's lands, and which estate could only have been such a one as came to Patterson by descent from Mrs. Hartley, whose heir at law he was—is estopped from denying a fee

simple estate in Mrs. Hartley ; or how far that sale of the defendant's may be used as counter evidence in the nature of an estoppel to meet the effect of her own declarations adverse to her interest, and considering the first and second counts apart from such sale under the execution, I am of opinion the defendant is right in his contention, to this extent, that he may shew that Mrs. Hartley claimed no more than an estate for life, and, therefore, that that was the duration of her estate, by estoppel or otherwise, as against the defendant ; and of course he may shew as a fact that the demise to him was only for her life, and that in that event there was no estate or reversion in her to go to any one. The estoppel which excludes a tenant from disputing his landlord's title ceases upon the expiration of the lease : *Bayley v. Bradley*, 5 C. B. 396.

Wilde, C. J., citing *Co. Litt.* 47*b*, at p. 400, said : "For, by the making of the lease the estoppel doth grow, and, consequently, by the end of the lease, the estoppel determines." And he continued : "The only qualification I am aware of, that has been engrafted upon that rule, is, that if the tenant *came into possession* under the lessor, he must restore the possession before he disputes the title."

Here the lessor, Mrs. Hartley, is dead. The defendant, therefore, may shew in any action brought by any one claiming from or under her that she had no title to transmit to her devisee.

That was expressly decided in *Brudnell v. Roberts*, 2 Wils. 143, and in many other cases referred to in *Walton v. Waterhouse*, 2 Wms. Saund. ed. 1871, 826, note (1).

That rule is not confined only to leases by which an interest has passed, for in *Doe d. Higginbotham v. Barton*, 11 A. & E. 307, where a mortgagor in fee in possession had demised to the defendant for years, who paid him rent, and the mortgagor afterwards made a second mortgage to the lessor of the plaintiff, who gave notice to the defendant to pay him rent, which he did, and afterwards the assignee of the first mortgagee gave the defendant notice to pay the rent to him, it was held that the notice from the one hav-

ing the legal title determined the title of the defendant's lessor, the mortgagor, and of the title of the lessor of the plaintiff, the second mortgagee, dependent upon it, and that the defendant was not estopped from shewing these facts.

So where the plaintiff had no title and let to the defendant, who paid rent, and before the expiry of his term the true owner gave notice to the defendant not to pay rent to the plaintiff, it was held in an action for use and occupation for the residue of the term for which the defendant had not paid rent, that the defendant could shew these facts, although he had not given up possession, and although he had kept possession for the full period of the demise made to him by the plaintiff: *Mountnoy v. Collier*, 1 E. & B. 630; *Robertson v. Bannerman*, 17 U. C. R. 508.

The case of *Weld v Baxter*, 11 Ex. 816, and affirmed in 1 H. & N. 568, is also expressly in point.

Mr. Armour relied on the decision in *Cuthbertson v. Irving*, 4 H. & N. 742, affirmed in 6 H. & N. 135, as an authority which precluded the defendant from shewing that the interest of Elizabeth Hartley had determined by her death whether because she never had any estate, or because she had limited her estate to one for life by her own declarations.

That case does not strictly apply here. The main question was, whether one Biglands, the lessor, who had only a reversion as against the defendant, his tenant, by estoppel, the plaintiff, as assignee of that reversion by estoppel, could bring an action against the tenant on his covenants; or whether, to entitle the assignee of the lessor to sue, he must not have an actual legal title, and not one merely by estoppel. The Court determined that the assignee of an estate created by estoppel could sue on the covenants.

Martin, B., in giving the judgment of the Court, said, p. 758: "So long as the lessee continues in possession under the lease, the law will not permit him to set up any defence founded upon the fact that the lessor '*nil habuit in tene-mentis*,' and that upon the execution of the lease there is

created, in contemplation of law, a reversion in fee simple by estoppel in the lessor, which passes by descent to the heir, and by purchase to the assignee or devisee." But that is only during the continuance of the lease, or so long as the real owner does not intervene.

That the reversion is in contemplation of law a fee simple, is only a presumption of law: *Sturgeon v. Wingfield*, 15 M. & W. 224; *Cuthbertson v. Irving*, 6 H. & N. 135, at p. 138, per Williams, J.

The defendant, as the last case shews, and as many others shew, as lessee, could during Elizabeth Hartley's life have traversed that she was seized in fee of the reversion, and if he could do it then, he can certainly do so since her death.

There is no authority which determines that the estoppel between landlord and tenant applies for any longer period than during the continuance of the lease at the most.

When no interest passes by the lease, it takes effect only by estoppel, and the lessor's estate, if no other interest appeared, would be presumed to be a fee simple; and so long as the lease lasted the tenant would be estopped from disputing that interest, whether in the life or after the life of the lessor, and so long as he remained in possession under the lease; but after he gave up possession, or had been compelled to attorn to the true owner, or had been evicted by him, he could then shew the determination of the lessee's defeasible estate. And the evidence was, and is, that this lease was determinable at the death of Mrs. Hartley by express agreement, and no rent has been paid since then, a period of six or seven years. The defendant was not bound to give up possession, because the estate and interest of the lessor determined at her death, and there was no interest which she could transmit to any one, heir-at-law or devisee.

If the lease had been for a term which extended beyond the lessor's death, and no interest had ever passed by it, but it had effect only by estoppel, the defendant, while he remained in possession under that lease, could not, I think,

dispute the claim of any one who rightly represented her ; but that is not the case here, for the lease ended with her death by efflux of time, and her estate, by her own declaration, ended then, too ; and, in either event, the defendant continuing in possession after her death was not in possession under the lease. Mrs. Hartley, under these facts, had not the reversion in fee in fact or in law, and that the defendant had the right to traverse.

The plaintiff must fail upon the two first counts, for neither as assignee of the heir-at-law of Mrs. Hartley, or as devisee under her will, is she entitled to a verdict. I may refer also to *Board v. Board*, L. R. 9 Q. B. 48 ; and to *Gray v. Richford*, 1 App. 112.

But with the fact against the defendant that he did sell the estate of Alexander Patterson under his execution, it is receivable as opposing evidence to counteract the declarations of Mrs. Hartley that she had only a life estate, because if Patterson had an interest to sell it was only as heir-at-law of Mrs. Hartley, in which case she must have had a descendible interest, and I think it may be used as evidence for that purpose in favour of the plaintiff, on these counts so far as the continuance of the estate of Mrs. Hartley is in question.

But I am of opinion that the defendant is nevertheless entitled to succeed upon these counts, because the evidence upon the whole is rather with the defendant than with the plaintiff, that his lease expired on Mrs. Hartley's death.

Then as to the third count, under which the plaintiff claims as purchaser of the property at sheriff's sale, under the defendant's execution against her husband, and for which she paid value to the defendant, who authorized and directed the sale, I think she is entitled to a verdict.

The defendant is, by his conduct, concluded from disputing the title of Alexander Patterson in and to the property, under the circumstances, which he, the defendant, sold or proposed to sell, and sold for value. *Doe d. Harley v. McManus*, 1 U. C. R. 141, is expressly in point ; and *Pickard v. Sears*, 6 A. & E. 469 ; *Gregg v. Wells*, 10 A. &

E. 90; *Freeman v. Cooke*, 2 Ex. 654, and the numerous cases decided on that point since then, establish the same doctrine.

I refer also to *Knights v. Wiffen*, L. R. 5 Q. B. 660, and to *Taylor* on Evidence, 6th ed., sec. 769, and the following sections and to the authorities therein mentioned.

The rule will therefore be absolute to enter a verdict for the plaintiff on the issues to the third count, with damages, and to enter the verdict for the defendant on the other issues.

HARRISON, C. J., and MORRISON, J., concurred in the result.

Rule accordingly.

THE STANDARD BANK OF CANADA V. JOHNSON.

Insolvency—Discharge—Pleading—Plaintiff's claim not mentioned.

The plaintiffs sued defendant as a shareholder in their bank for calls, and defendant pleaded his discharge under the Insolvent Acts of 1869 and 1875, the assignment having been made under the former, and the deed of composition and discharge filed under the latter Act. It appeared that the only mention of the plaintiffs' claim in defendant's statement of affairs and schedule was this entry in the statement of assets, "25 shares St. Lawrence Bank stock; amount paid up \$500": *Held*, that the plaintiffs' claim was not discharged.

THE declaration was against the defendant, as a shareholder in the plaintiffs' bank, for certain calls.

The first plea was that the defendant, being a trader, became insolvent, and made an assignment under the statute of 1869, and that after such assignment, and previous to the meeting of his creditors, statements were prepared shewing the position of the affairs of the defendant, and particularly a schedule in the form provided in said Act, containing the names and residences of all the creditors of the defendant, and the amount due to each, which statements were exhibited at the first meeting. That the claim of the plaintiffs, being at the

date of such assignment existing against said defendant and provable against his estate, was mentioned and set forth in the said statement of affairs exhibited at said first meeting of defendant's creditors, in the words and figures following, that is to, say, "25 shares St. Lawrence Bank stock, amount paid up, \$500." (The name, "St. Lawrence Bank," has been changed to "The Standard Bank of Canada.") That subsequent to said meeting and after the Insolvent Act of 1875, the defendant filed a deed of composition and discharge, which discharge was afterwards confirmed by the Judge, &c.

To this plea the plaintiffs replied by setting out a copy of the schedule of liabilities, in which the name of the plaintiffs did not appear, and averring that the claim of the plaintiffs was never proved against the estate of the said defendant.

And, for a second replication to the first plea, the plaintiffs said, that in the statement of affairs of the said defendant exhibited at the first meeting of his creditors, as in the said first plea mentioned, the plaintiffs' claim was mentioned and set forth the schedule of assets of the said defendant, in the words and figures in the said plea mentioned and set forth, but the plaintiffs' name, as creditors, was not mentioned otherwise in the schedule and statement of affairs in the said plea mentioned, and the plaintiffs' claim was never proved against the defendant's said estate.

To these replications the defendant demurred, on the grounds that they contained no answer to the defendant's plea, and shewed no reason why the certificate of discharge by the Judge should not be a valid discharge.

March 16, 1877. The demurrer was argued by *Rose*, for the defendant, who relied on the 3rd section of the Insolvent Act of 1869, and on the principle of law as laid down in *Farrell v. O'Neil*, 22 C. P. 31; *King v. Smith*, 19 C. P. 319; *Palmer v. Baker*, 22 C. P. 59; *Cameron v. Holland*, 29 U. C. R. 506; *Preston v. Hunton*, 37 U. C. R. 177.

Bethune, Q. C., for the plaintiffs, cited the 61st section of the Act of 1875, as shewing the debts from which a dis-

charge, confirmed by the Judge, shall absolutely free and discharge the debtor, and contended that under the facts set forth in the pleadings in this case the debtor was not discharged. He also cited *Thompson v. Rutherford*, 27 U. C. R. 205; *Wilson v. Breslauer*, L. R. 2 C. P. D. 314.

August 28, 1877. GALT, J.—By the 3rd section of the Act of 1869, which was the Act in force at the time when the assignment in this case was made, it was the duty of the assignee, (not of the insolvent), previous to the first meeting of the creditors, to prepare and exhibit statements shewing the position of the affairs of the insolvent, &c., and a statement shewing the amount and nature of all the assets of the insolvent, including an inventory of his estate and effects; and the insolvent shall assist in the preparation of such statements, and of the said schedule, and shall attend at such meeting, &c., &c.

It is admitted on these pleadings that the position of the defendant, as regards these plaintiffs, was disclosed by the statement of affairs by the entry set out in the plea, namely, that he was the holder of twenty-five shares in the St. Lawrence Bank, on which \$500 had been paid, and it appears to me that was all which it was incumbent on the defendant to do. He made a full statement of his affairs, and if the assignees entered these shares as an asset and not as a liability, it was no fault of the defendant.

It was contended by Mr. Rose, further, that the replications were both defective in not averring that the plaintiffs had no notice of these proceedings, and in this view I am of opinion that the replications are also defective. For all that appears the plaintiffs may have had full notice of all that was done. The statute requires that notice to creditors shall be given, and there is an averment in the plea that all conditions, &c., were performed, &c., which is not denied by the replication. I am, therefore, of opinion that judgment should be entered for the defendant on the demurrer to both replications.

From this judgment the plaintiffs appealed, and the case was reheard November 26, 1877.

Bethune, Q. C., and R. M. Fleming, for plaintiffs.

Rose, for defendants.

The arguments were similar to those before Galt, J.

November 27, 1877. HARRISON, C. J.—The plaintiffs are entitled to recover unless the discharge pleaded by the defendant is a bar to the plaintiffs' recovery.

The discharge pleaded can only be effective if in compliance with the Insolvent Act in force at the time it was filed. The assignment by the defendant is alleged to have been made after the passing of the Insolvent Act of 1869. The statement shewing the position of the affairs of the defendant, and particularly the schedule containing the names and residences of the creditors of the defendant, were, of course, after the passing of the same Act, but the filing of the discharge by the defendant is alleged to have been after the passing of the Insolvent Act of 1875.

It is unnecessary to decide whether the discharge is governed by the provisions of the Act of 1869 or the Act of 1875, for section 65 of the Act of 1875 like section 98 of the Act of 1869, provides only for a limited discharge, and the language of the two Acts on the point is identical. The discharge is not from all liabilities whatsoever, but only against such as are provable against the debtor's estate, and "are mentioned and set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shewn by any supplemental list of creditors furnished by the insolvent previous to his discharge."

The sufficiency of the statement or schedule, as it was made before the Act of 1875 came into force, must be determined by the provisions of the Act of 1869. While under section 3 of the Act of 1869 it is made the duty of the interim assignee to prepare and exhibit statements shewing the position of the affairs of the insolvent, and particularly a schedule containing the names and resi-

dences of all his creditors, and the amount due to each, it is also made the duty of the insolvent to "assist in the preparation of such statements and of the said schedule," and the insolvent is required to "file a declaration, under oath, stating whether or no such statements and schedule are correct, and if incorrect, in what particulars." Besides, it is in the power of the insolvent, if necessary, to furnish a supplemental list of creditors : Section 98.

It was the duty of the insolvent, under the Act of 1864, to exhibit these statements and schedule. Under the Act of 1864 it was held that unless the name of the creditor appeared in the schedule so exhibited by the insolvent, the discharge was inoperative : *King v. Smith*, 19 C. P. 319 ; *Palmer v. Baker*, 22 C. P. 59 ; but much liberality was allowed in the construction of what did appear in the schedule as designed for the purpose of covering the creditor's demand : *Cameron v. Holland*, 29 U. C. R. 506 ; *Farrell v. O'Neill*, 22 C. P. 31. The insertion of the name of the creditor and the amount of the demand in his statement of affairs or schedule, has been held to be as necessary for the purposes of the discharge under the Act of 1869 as the Act of 1864 : *Preston v. Hunton*, 37 U. C. R. 177, 197 ; The existence of a properly prepared statement or schedule shewing the names of the insolvent's creditors and their amounts, whether the same be prepared by the insolvent himself, or prepared by the assignee, assisted by the insolvent, appears to be still necessary to sustain a discharge as against a particular creditor suing, notwithstanding the insolvency. A recognised exception is where the creditor, notwithstanding the omission of his name and amount of claim, &c., from the schedule, is shewn to have so acted as if his name and amount of claim were inserted therein : *Campbell v. Im Thurn*, L. R. 1 C. P. D. 267. But that does not extend to a case where the creditor acts solely in reference to some other claim of his described in the schedule : *Wilson et al. v. Breslawer*, L. R. 2 C. P. D. 314. No such conduct as last described is imputed to the plaintiffs by the pleadings in this case. The validity of the dis-

charge as against the plaintiffs' demand must, therefore, turn on the sufficiency of the statement of affairs and schedule. Neither the name of the plaintiffs nor the amount of their claim appears in the schedule of creditors. The only reference to it is in the statement of what seems to be a statement of assets, and that reference is as follows: "Twenty-five shares St. Lawrence Bank stock, amount paid up, \$500." This is no statement of a liability to any person, and certainly no statement of a liability to any amount. It is rather the statement of an asset. It cannot, we think, be affirmed that the liability of the defendant to the plaintiffs is, in the words either of the Act of 1869 or 1875 "mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors," or shewn "by any supplemental list of creditors furnished by the insolvent" previous to the discharge.

Therefore, the foundation for the contention that there was any operative discharge as against the plaintiffs' demand is, in our opinion, entirely wanting.

It is of great importance that proceedings which are designed to deprive men of their *primâ facie* right to recover judgment for the full amount of their demands should be substantially regular.

Where a creditor voluntarily and for good consideration discharges a portion of his debt, he is bound by his own conduct. But where it is sought to bind him by the will of others it must be shewn that the machinery made necessary under the statute to bind him has been properly worked. And unless so worked the result designed by the statute cannot, in our opinion, be effected.

A creditor who, under these circumstances, stands upon his legal rights is not to be blamed. He certainly cannot be charged with fraud. He says nothing. He does nothing. And his debtor, who has omitted to do or to see done what the statute makes necessary for his own protection, has only himself to blame if there be no protection. See *Ex parte Lang*, *Re Lang*, L. R. 5 Ch. D. 971.

The decision of Mr. Justice Galt must be reversed, and judgment entered for the plaintiffs on the demurrer to the replications, with costs.

MORRISON, J., and WILSON, J., concurred

Appeal allowed.

FRANCIS BARTELS V. ESTHER BARTELS, ISABELLA BARTELS,
ANDREW BARTELS, AND JAMES BURT.

Will—Construction—Estate for life—Ejectment—Proof of title—Estoppel.

A testator devised all his real and personal estate to his beloved sons E. and J. in fee, "subject, however, to the following conditions: First, That my beloved daughters" (six in number, naming them) "shall have at all times a privilege of living on the homestead and maintained out of the proceeds of the said estate during their natural lives."

Held, that the daughters took a life-estate in the homestead, and that the death of some of them did not diminish the right of the survivors.

Held, also, that the defendants, who entered claiming title under the same will as the plaintiff (the plaintiff claiming under E.), were properly prevented at the trial from setting up title by possession independently of the will; but to avoid embarrassment in entering a general verdict for the defendants (two of the daughters and their tenant), the notice as to this mode of title was struck out of the record.

THIS was an action of ejectment brought by a writ issued on 30th June, 1876, for the recovery of an undivided half of the north-east quarter of lot 7 and the north half of lot 8, in the fourth concession of Ernestown, containing about 160 acres of land.

The plaintiff claimed title under the last will of Justus Bartels, deceased, devising the land to Ebenezer Bartels, and by different mesne conveyances to the plaintiff.

Esther Bartels and Isabella Bartels appeared and defended for the whole under the same will, and by uninterrupted possession for twenty years.

The defendant Andrew Bartels limited his defence to four acres, but at the trial his name was struck out of the record.

The defendant James Burt claimed as tenant under Esther and Isabella Bartels.

The cause was tried at the last Assizes for the county of Lennox and Addington, before Gwynne, J., without a jury.

The land was at one time the property of Justus Bartels. He had other real estate in the township of Ernestown, but this was known as his homestead. He died in possession of it on the 21st of April, 1852. By his last will, dated 11th of April, 1852, he devised as follows: "First, after all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, devise, and dispose of as follows: I give and bequeath to my beloved sons Ebenezer Erskine Bartels and James Fisher Bartels, their heirs and assigns, all my real and personal estate wherever situate, lying and being in the township of Ernestown, and county of Addington, one of the united counties of Frontenac, Lennox, and Addington, subject however to the following conditions: First, that my beloved daughters Esther, Isabella, Jennett, Alla, Louisa, and Henrietta Bartels, shall have at all times a privilege of living on the homestead and maintained out of the proceeds of the said estate during their natural lives."

The daughters Alla and Henrietta died before the commencement of the suit.

The daughter Jennett married before the suit, and after her marriage ceased to live on the land.

The daughter Louisa did not marry, but never lived on the land.

The remaining daughters, Esther and Isabella, defendants in this cause, never left the land.

Esther, on the 9th of April, 1873, made a demise of the land to the defendant James Burt, enabling him to work the farm on shares.

As the defendants entered and claimed under the will of Justus Bartels, the learned Judge refused to allow them to assert a title by twenty years' possession independently of or to the exclusion of the will.

The learned Judge held that the daughters had an estate for life in the land, and that the death of one or more of them did not divest the survivors of their estate in the land and right to the enjoyment of the whole.

He accordingly entered a verdict for the defendants.

During Easter term, May 25, 1877, *Wallbridge*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff, pursuant to leave reserved, on the ground that the verdict for the defendants was contrary to law and evidence, the plaintiff having shewn title under and through the last will of Justus Bartels and an actual ouster by the defendants.

Reeve, of Napanee, during the same term, June 6, 1877, shewed cause. The ruling was correct, according to the authority of *Fulton v. Cummings*, 34 U. C. R. 331, and if not there should be a new trial to enable the defendants to establish title by length of possession.

Wallbridge, Q. C., contra. *Fulton v. Cummings* is distinguishable, and the will, in this case, does not confer any life estate on the daughters. He cited 1 *Jarman* on Wills, 3rd ed., 23.

November 19, 1877. HARRISON, C. J.—We are called upon in this case to place an interpretation upon the will of Justus Bartels.

If a little more money were expended by testators in having their wills prepared by men whose training and profession it is to prepare written documents demanding legal precision, there would be less money spent in litigation to endeavour to ascertain the meaning of what has been written.

The cardinal rule for the construction of wills is, if possible, to ascertain and carry out, consistently with the language used, the intention or the purpose of the testator.

But, owing to the frequency of cases as to wills

Courts of Justice have laid down certain technical rules for the construction of wills, the application of which, in some cases, defeats the intention or purpose of the testator.

When one of these rules in the argument was pressed upon, James, V. C., in *Habergham v. Ridehalgh*, L. R. 9 Eq. 395-400, the learned Judge said: "That reasoning is a very good illustration of the process by which in this Court we have established a body of dogma, and developed a whole code of artificial rules, according to which a testator's will is treated as if it were something written in cypher, and incapable of being construed except by those learned persons who have the key to the cypher. Nevertheless, sometimes the Court is enabled to determine questions arising upon wills according to the rules of common sense; either by playing off one rule against another, or by resorting to some general rule of construction which controls the rest."

This language was recently approved by Malins, V. C., in *Re Speakman*, L. R. 4 Ch. D. 620-625. The latter said: "I agree entirely with the observations of Vice-Chancellor James, in *Habergham v. Ridehalgh*, as to the principles which ought to guide the Court in the construction of wills, that is to say, they ought to be so interpreted as not to defeat the intention of the testator by technical rules of construction; but by considering the language in a free, liberal, and common sense spirit, to give effect to his manifest intention."

Mr. Justice Lawson, in *Watson v. Arundell*, L. R. 11 Ir. Eq. 53, 88, said: "The proper mode of arriving at the construction of a will is, first, to consider what is the ordinary meaning of the language which the testator has used, and, as soon as you have ascertained his intention from his language, then to consider whether there is any rule of law, or any settled course of decision which prevents you from carrying out and giving full effect to the testator's intention. The reverse of this process is, I fear, too often resorted to, that of interpreting the language of the will by previous decisions, and endeavouring to ascertain which of these decisions most

clearly fits in with the words of the will you are expounding, and so governs it."

The Lord Justice of Appeal, in the same case, used this language, p. 69: "There is nothing which Courts of construction have more aimed at than the bringing themselves, as it were, into sympathy with their testator; by getting round to his point of view, and surrounding themselves, as they sat trying to get at the meaning of his words, with the associations and circumstances which lay around himself when he was using them. It is true that this process has its limits. We must work with the words which the will affords us. We must not, in speculation, however plausible, which these outside circumstances may suggest, impute to the testator intentions which cannot in sound construction be brought under his language."

Lord Justice James, in *Re Veale's Trusts*, L. R. 5 Ch. D. 622, 624, went so far as to say: "The Court is not bound by any rule of construction which leads to a result contrary to the plain meaning of the testatrix." See further *Greenwood v. Greenwood*, L. R. 5 Ch. D. 954; *Ralph v. Carrick*, *Ib.*, 984.

There can be no doubt the first step is to be satisfied what the intention really was, and then see how far the words of the will carry that intention into effect. Per Malins, V. C., in *Re Speakman*, L. R. 4 Ch. D. 620, 624. See also per Jessel, M. R., in *Re Sibley's Trusts*, L. R. 5 Ch. D. 494, 498. See further *Re Redfern*, L. R. 6 Ch. D. 24; *Buthurst v. Errington*, L. R. 2 Ap. 698.

It is manifest, on reading the will now before us, that the intention of the testator was in some manner to make provision out of his estate as well for his daughters as his sons.

All were "beloved" by him, and intended to be the objects of his bounty.

The general devise of all his estate, real and personal, including the homestead, to his beloved sons, is made subject to a devise of some kind in favour of his beloved daughters.

The question which we have to decide is as to the meaning and effect of the latter devise, which reads as follows: "Subject however to the following conditions: First, that my beloved daughters (naming them) shall have at all times a privilege of living on the homestead and maintained out of the proceeds of said estate during their natural lives."

The purposes of this devise are two-fold, first, that the daughters shall have a home during their lives, and secondly, that they shall be maintained during their lives.

The effect of the words "shall have at all times a privilege of living *on* (not in) the homestead" during their lives is, we think, to give them the homestead, that is the whole homestead, as *their* home—that is their *exclusive* home—during their lives.

The words shall be "maintained out of the proceeds of the *said* estate" during their lives, can only refer to "the real and personal estate" previously mentioned in the will, and not to the homestead, which in no part of his will is described as "estate."

This construction is not opposed to but consistent with such decided cases as have any bearing on the point.

In *Right d. Green v. Proctor*, Burr. 2208, it was held that a covenant "that Proctor shall reside and dwell in the house, free of all rent, except taxes," amounted to a lease of the house to Proctor.

In *Mannox v. Greener*, L. R. 14 Eq. 456, it was held that a devise to the widow of "the free occupancy of any house in my possession, for her life, free of any payments or charge whatever," conferred on the widow not only the right to reside in, but to let the house during her life.

In *Scouler v. Scouler*, 8 C. P. 9, where testator devised his lands to S., but directed that the devisee's mother and the youngest daughter of the testator "shall have a lien or claim on the said lands and tenements as a home during the term of either of their natural lives, then after their decease the same shall revert to the said S," it was held

that a joint estate for life to the devisees named or the survivor of them passed.

In *Hartman v. Fleming et al.*, 30 U. C. R. 209, where the owner of land, in consideration of natural love and affection, and of 5s., conveyed the land to her daughter in fee, "reserving, nevertheless, to my own use, benefit, and behoof, the occupation, rents, issues, and profits of the said above granted premises, for and during the term of my natural life," it was held that the deed might be regarded as a covenant to stand seized of the remainder to the use of the daughter, the life estate being in the grantor.

In *Fulton v. Cummings et al.*, 34 U. C. R. 331, it was held that a devise by a testator of his land to his son, but with these words, "My will is, that my wife shall be allowed to live on the said property during the term of her natural life," operated as a devise of the property for life to the widow.

There is no substantial difference between the words "shall have a privilege of," used in the will now before us, and the words "shall be allowed," used in the case last mentioned. Both expressions are designed to confer a benefit arising out of land at the time of the devise belonging to the testator. The duration of that benefit is for life. Each one named is entitled to that benefit to the full extent of its duration. The expiry of some of the lives does not diminish the right of the survivors, and does not, therefore, facilitate the right to possession of the person having the estate in remainder.

The learned Judge was, in our opinion, right in his construction of the will.

He was also right in refusing to permit the defendants who entered claiming title under the same will as that under which the plaintiff claims, to set up title by possession, independently of and to the exclusion of the will: *Hawksbee v. Hawksbee*, 11 Hare 230; *Anstee v. Nelms*, 1 H. & N. 225, 228, 232; *Persse v. Persse*, 3 Ir. Ch. 196, 210; *Kernaghan v. McNally*, 12 Ir. Ch. 89-101; *Board v. Board*, L. R. 9 Q. B. 48.

To avoid embarrassment which may arise from a general verdict for the defendants, where such a mode of title—that is, by length of possession—is in fact set up as one of the grounds of defence, we think it only proper to direct that the notice, as to this mode of title, shall be struck out of the record.

Subject to this direction, the rule *nisi* will be discharged.

MORRISON, J., and WILSON, J., concurred.

Rule discharged.

BEVERIDGE V. CREELMAN ET AL.

Highway—Dedication—By-law establishing.

In trespass q. c. f. it appeared that in 1858, one G., a surveyor, under whom the plaintiff claimed, obtained a patent for the land in question, which he had previously claimed to own. In 1857, he got up and presented to the Municipal Council a petition to open a road through the lot, as a continuation of R. street in the village of Collingwood. A by-law was passed accordingly in November, 1857, and G. ran the line for the road, which was afterwards made; \$200 being expended by the Council, but not on G.'s land, it not being required there. The road was used by the public as early as 1857, without objection by G., though he at one time placed a gate to keep cattle out of his farm, the road being unfenced. The road as used deviated at one point on G.'s land from the line of R. street, owing to a ravine.

Held, that G. had no power to dedicate before he obtained the patent, but that his subsequent acts amounted to a dedication.

Semle, that the by-law was sufficient, for it shewed that the extended road was to be in projection of R. street, the course of which could be readily ascertained; and that it did not require registration under 36 V. ch. 48, sec. 445, having been passed before that act.

THIS was an action for trespass *quare clausum fregit*, and for cutting down and destroying gate and fence posts, &c., tried before Hagarty, C. J., at the Barrie Fall Assizes of 1876, without a jury.

The first count in the declaration was for trespass to the west half of lot 40, in the 7th concession of Nottawasaga.

The second count was for trespass to the same lot, and cutting and destroying six gate posts, two fence posts, and a lock and chain.

Pleas: 1. Not guilty.

2. The second plea to the first count recited the Municipal Act, 12 Vic. c. 81, and set out that the township council of Nottaswaga was petitioned by the ratepayers of the township to open and establish a new road from a point or place where a street or highway called Raglan street had been laid out and opened, through lot 42, in the said township terminated, through the plaintiff's land in the declaration mentioned, and thence to the sand beach at or near the water's edge, in the northern boundary of the same, and thence to the town line dividing the township of Nottawasaga from the township of Sunnidale; and the municipality caused the line of road to be laid out on the ground by a deputy surveyor, by the running of the line from a point at the centre of Raglan street aforesaid, where it terminated on the southern limit of lot 42, where a survey or plan of the sub-division of the said lot, known as Gordon Brown's survey, ended, thence south 14° east through lot 41, and then through the land of the plaintiff to the original allowance for road between lots 39 and 40 in the said township, and further in continuation of the sand beach, and thence to the said town line. And the surveyor marked out the line of road by planting stakes, and blazing trees, and had made a diagram thereof. And the municipality, having received the report of the surveyor and diagram, duly passed a by-law for the opening and establishing of the said road, in accordance with the diagram made by William Gibbard, Esq., township surveyor, which by-law was set out in the plea, and it enacted that the line of road described in the by-law be established as a permanent road and public highway. This by-law was passed, on the 17th of November, 1857. The plea further averred that the diagram mentioned had been made by Gibbard, was the diagram of the line of road thereinbefore mentioned, Gibbard being the surveyor by whom the line of

road was run ; and that at the time of the passing of the said by-law, the street referred to, and called Raglan street, was laid out and opened through lot 42, up to a point on the boundary line between lots 42 and 41, in the 7th concession, and the new road was opened and established through the plaintiff's half lot, was not laid out to run through or encroach on any dwelling house, &c., or any garden, &c., and that the municipality caused the line of road to be opened in pursuance of the by-law through the close of the said plaintiff, in which, &c., on the line mentioned as being marked or laid out by William Gibbard, being the line in the by-law mentioned, and that the by-law has not been quashed.

3. To the first count : that before or at the time of the alleged trespass there was, and of right ought to have been, a certain common and public highway over and along the said close for all persons to go, return, &c., on foot and with horses, &c., at all times of the year, at their free will and pleasure, and the defendants having occasion to use and using the said road, committed the trespass.

4. To the second count, similar to the second plea ; and alleging that the defendants having occasion to use the highway, broke and entered the close of the plaintiff where the road commenced and crossed the same for the purpose of using the said road, and because at the time when, &c., the said six gate posts and lock and chain then fixed thereon had been placed and were then wrongfully in and upon and across the road, obstructing the same, and preventing the convenient use thereof ; and the defendants necessarily threw down, removed and damaged, and injured the same for the purpose of using the highway, doing no unnecessary damage.

5. Justifying the removing, damaging and injuring the gate, lock, and chain, and fence posts, for the purpose of using the road.

The plaintiff joined issue on all the pleas, and new assigned as to the second and third pleas, that he sued not only for the trespass in this place admitted, but also for

trespass committed by the defendants in excess of the alleged rights, and also in other parts of the said land, and on other occasions, and for other purposes than those required in said place.

There was also a new assignment as to the fourth and fifth pleas.

A further replication was added at the trial to the defendants' second and fourth pleas: that at the time of the passing of the by-law the land of the plaintiff in the declaration mentioned was part of the unpatented lands in the province of Ontario, belonging to Her Majesty.

And a further replication, that the title to the lands mentioned in the first and second counts is a registered title, and that subsequent to the passing of the statute in the plea mentioned, and subsequent to the passing of the by-law, the said statute was repealed, and a statute entitled an Act respecting municipal institutions, &c., was passed in the thirty-sixth year of the reign of Her Majesty, ch. 48. And the replication averred that the said alleged highway was not opened under and in pursuance of the said by-law prior to the time when the plaintiff became purchaser of the said land, or at any time thereafter; and the by-law was never acted on or enforced, nor was it ever treated as being of any validity. And long subsequent to the time of the said by-law, on or about the 1st of July, 1870, the plaintiff became the purchaser of the lands aforesaid, in good faith, for value, without notice of the by-law, and the said by-law was not registered against the said land.

At the trial a rejoinder was allowed, averring notice of the unregistered by-law, &c.

The land at one time belonged to William Gibbard, under whom the plaintiff claimed. He was the grantee from the Crown of the west half of lot 40, in the seventh concession of Nottawasaga. The grant was not issued until 19th of April, 1858.

Before the issue of the grant from the Crown, Gibbard claimed to own the land granted, and was most anxious to have a highway laid out through it as a continuation of a

street known as Raglan street. He, in the latter part of 1857, with his own hand, wrote a petition, and afterwards signed it, and obtained other signatures to it, addressed to the municipal council of the township of Nottawasaga, asking the council to make a road through the land in question as per a diagram which had since been mislaid. He was also active in other respects in promoting the passage of the petition.

The council of that township on the 17th of November, 1857, as asked by the petitioners, passed a by-law to establish the line of road asked by the petitioners, and described as a continuation of Raglan street, on a course north 16° west from the side road of lots 39 and 40, to the side road of lots 41 and 42, up to the survey of Gordon Brown.

The line shortly afterwards was run by Gibbard himself through the lot, he placing pickets where the road entered his lot and where it left his lot; but there was no evidence of the situation of intermediate pickets, if any, between these two points.

Raglan street was, before the passing of the by-law, a well known and well defined travelled road in the township. The object of opening the road in question through Gibbard's land as a continuation of Raglan street was by means thereof to have access to the beach leading to Nottawasaga river, and thence to the townships of Flos and Sunnidale.

Mr. Gibbard, at the time of the petition and the passing of the by-law, was a surveyor and engineer for that township. His intention at the time was, to lay out the land in five-acre park lots. The township entered into a contract for the expenditure of money on the road. About \$200 were expended on it, but not at the place where it crossed Gibbard's land. There was a good natural gravel roadway through his land, so good as not to call for much public expenditure there. The public, as early as 1859 and 1860, were able to make use of the highway through Gibbard's land. Although there was at one time a gate placed across

the entrance of the road for the purpose of excluding cattle from the farm, there was never any objection in Gibbard's life time to the use of the highway by the public. He told persons that it was a highway procured by his exertions from the township. He died in 1865, and the land, after several *mesne* assignments, in 1870 became the property of the plaintiff. The plaintiff acquired the land with some knowledge of a highway through the land. The by-law establishing the highway was never registered.

The defendants in February, 1876, entered on the land for the purpose of opening the highway in accordance with the provisions of the by-law, and this entry was the trespass in respect of which the plaintiff sued.

The town of Collingwood was incorporated in 1857 by 20 Vic. ch. 96. The incorporation took effect from 1st January, 1858.

The line between the town and the township runs along the north side of the lot in question, leaving the lot still in the township of Nottawasaga, but adjoining the town.

The learned Chief Justice found that Gibbard surveyed the road: that he put down a picket where it entered at the north side, and another on what is called the side road at the south—perhaps other pickets—but this was not clear; that Gibbard told people there was a road there and wished it used, and that there was no doubt people used the road for years, though there was little travel over it. Bars (or a gate) were up for some years; some witnesses said the gate was to keep cattle out, as the road in question was not fenced. Sometimes the bars were down in winter. One Jones, who held under Mrs. Gibbard, allowed people to cross, another Jones holding under her objected. But it was since the plaintiff purchased from Mrs. Gibbard, in 1870, that nearly all (if not all) the trouble had been.

The plaintiff purchased, as the learned Chief Justice found, with full notice that Gibbard surveyed and picketed a road across his lot.

He found that Gibbard did all in his power to open and dedicate a road across his lot, and that the plaintiff

purchased with full notice of all this and of the action of the municipality, and that a road had been, in fact, used for many years—from 1858 down to the plaintiff's purchase.

There was a ravine in the plaintiff's lot, and persons passing necessarily deviated to the east to avoid this. The road laid out by different surveyors was not a direct projection of Raglan street, but it was run to a post apparently planted by Gibbard at the south end.

The learned Chief Justice found a verdict for the defendants.

During Michaelmas term, November 23, 1876, *J. K. Kerr*, Q. C., obtained a rule, calling on the defendants to shew cause why the verdict should not be entered for the plaintiff, for such amount as the Court might deem the plaintiff entitled to recover, pursuant to the Law Reform Amendment Act, or for a verdict on the new assignments for the trespasses *extra viam*.

During Hilary term, February 10, 1877, *McCarthy*, Q. C., with him *Moberley*, shewed cause. The by-law is good and sufficiently describes the highway. At all events it has been passed more than twelve months, and has not been moved against, and so is binding, though it had been void at first. Dedication has been clearly established.

Kerr, Q. C., contra. The evidence shews that the road was not dedicated. Gates and bars were put across it, and the use of it by the public continually interrupted. The by-law is defective in describing the road. The road as used is not that set out in the by-law.

The following authorities were cited during the argument: *Dennis v. Hughes*, 8 U. C. R. 444, 451; *Brown v. The Municipal Council of the County of York*, *Ib.* 596; *McIntyre v. Municipal Council of Bosanquet*, 11 U. C. R. 460; *Regina v. Plunkett*, 21 U. C. R. 536; *Regina v. Wismer*, 6 U. C. R. 293; *Belford v. Haynes*, 7 U. C. R. 464.

November, 19, 1877. HARRISON, C. J.—The substantial question for decision is, whether at the time of the alleged trespass the *locus in quo* was a highway.

Unless it became a highway either by dedication of Gibbard or by the action of the township council, or by both, the plaintiff must recover in this action.

If before the conveyance from Mrs. Gibbard, under which the plaintiff claims, the *locus in quo* became a highway the conveyance to the plaintiff is of course subject thereto, although there be no reference to it on the face of the conveyance: *Malloch v. Anderson*, 4 U. C. R. 481.

Until Gibbard acquired the land on the 19th of April, 1858, by grant from the Crown, he had no power by dedication to bind the Crown, in whom, up to that date, the estate was vested: *Regina v. Wismer*, 6 U. C. R. 293. But after the issue of the letters patent to him there was nothing to prevent him confirming what had already been done, or so acting as again to dedicate the land, and then binding himself as regards all the interest which he possessed under the grant from the Crown.

It is clear on the evidence that Mr. Gibbard's purpose was to make a permanent and absolute dedication, with a view to the laying out of park lots adjoining the town of Collingwood.

If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through by positive prohibition, he shall be presumed to have dedicated it to the public: *Rex v. Lloyd*, 1 Camp. 260, 261.

In order to constitute a dedication of a highway to the public by the owner of the soil, there must be an intention so to dedicate, of which user by the public with his knowledge is evidence: *Barraclough v. Johnson*, 8 A. & E. 99; *Poole v. Huskinson*, 11 M. & W. 827.

While the placing of a gate across the road is evidence to rebut the presumption of dedication—*Roberts v. Kerr*, 1 Camp. 262; *Setteridge v. Winter*, *Ib.*; *Commonwealth v. Newbury* 2 Pick. 51; *State of Maine v. Inhabitants of Strong*, 25 Maine 297; *Proctor v. Town of Lewiston*, 25 Ill. 153; *Carpenter v. Gwynn*, 35 Barb. 395—it is not con-

clusive, for it may be shewn that the gate was placed on the road for the mere purpose of excluding cattle from the premises of the owner : *Johnston v. Boyle*, 8 U. C. R. 142.

The question of dedication or no dedication is a question of fact, to be decided, like other questions of fact, by the Court where there is no jury, and by the jury where there is a jury : *Belford v. Haynes*, 7 U. C. R. 464.

We see no room to doubt the correctness of the finding of the learned Chief Justice, who tried this cause without a jury. He found that Gibbard did dedicate land for a highway through the lot in question: that the land so dedicated was used by the public with his knowledge and assent: that the road which the public travelled was in consequence of a ravine not a direct projection of Raglan street, but a projection of Raglan street with the necessary deviation because of the ravine, and that the road so travelled was continued to pickets placed by Gibbard on the southern boundary of the lot.

In this view of the case we do not think that there can be properly said that there was any trespass *extra viam*.

We are therefore of opinion that the defendants are entitled to succeed, on the general pleas that the *locus in quo* was at the time when, &c., a common and public highway.

We are inclined to the opinion that the special pleas, alleging a by-law establishing the highway, are also sustained.

The by-law shews that the intended road was to be a projection of Raglan street, of the width of Raglan street, and on the course of Raglan street. Now as the situation, course and width of Raglan street could be readily ascertained, there ought to be no difficulty in ascertaining the intended projection of it.

The by-law is, in our opinion, good, on the authority of *Dennis v. Hughes*, 8 U. C. R. 444; *Brown v. The Municipal Council of the County of York*, *Ib.* 596; *McIntyre v. Municipal Council of Bosanquet*, 11 U. C. R. 460.

We do not, however, so much rely upon the passing of the by-law as *per se* establishing the road, as the fact that

the by-law was passed at the request of Mr. Gibbard, a fact proper for consideration with the other facts in the case on the question of dedication by him.

The by-law is not one which required registry under section 445 of 36 Vic. ch. 48, O., having been passed before that statute became law, and therefore only to be registered at the election of any party interested. Besides, as the learned Chief Justice has found as a fact that the plaintiff, when he purchased, had notice of the by-law, on evidence which supports the finding, there is no case of actual hardship made out on the part of the plaintiff.

It may be that after the laying out of the road, and after Mr. Gibbard's death, Mrs. Gibbard or the plaintiff became satisfied that the land could be more profitably used as a farm than as park lots, but this is only ground for an application to some authority having power to close the highway and extinguish the right of the public to the user of it. The change of purpose on the part of the owner of the land can give no right to the owner, or those claiming under him, to deprive the public of the easement already acquired by them.

There is really nothing in the contention that the land was dedicated by Mr. Gibbard before he acquired the fee from the Crown. His interest in the land before the issue of the letters patent was not shewn; but after the issue of the letters patent in April, 1868, there is abundant evidence of the user of the road by the public with his assent. Indeed, the evidence shews more. It shews that up to the time of his death he was actively co-operating with the public in the use of the road as a public highway. This is evidence of dedication by him at a time when he alone could dedicate the land for the purposes of a public highway.

MORRISON, J., and WILSON, J., concurred.

Rule nisi discharged.

CLARKE V. SARNIA STREET RAILWAY COMPANY.

Corporation—Contract—Ultra vires—Executed consideration.

The defendants, a street R. W. Co., entered into an agreement on the 29th December, 1874, before their road was in operation, with the Grand Trunk R. W. Co., to carry freight for that company between the town of Sarnia and Point Edward, and in April, 1875, their road being still unfinished, they, in order to fulfil their contract, agreed with the plaintiff, a steamboat owner, for the transportation of merchandise by water between these points until their railway should be opened. The plaintiff performed the service, and the defendants received payment from the G. T. R. W. Co. therefor. It was objected that the defendants had no power to make the contract with the plaintiff, and that he therefore could not recover; but, *Held*, that to the extent to which the defendants had so benefited by the plaintiff's services they were liable to him, and should not be allowed to raise the objection of *ultra vires*.

DURING last Hilary term, February 20, 1877, *W. R. Mulock* obtained a rule calling upon the plaintiff to shew cause, by way of appeal, why the certificate, rule, or report of J. H. Bucke, an arbitrator, should not be set aside with costs, on the ground that there was no evidence of the liability of the defendants for the plaintiff's claim; and that there was no contract between the plaintiff and defendants under which the plaintiff's claim could be allowed; and on the ground that the plea of never indebted was proved, and the arbitrator should have found on it in favour of the defendants; and on the ground that the contract, if any, was *ultra vires*. And why the Court should not pronounce and make the award which, in their judgment, the arbitrator ought to have made; and why the amount of the award should not be reduced to the amount received by the defendants subsequent to the 5th of July, 1875, or why it should not be referred back to ascertain such amount.

The application was based upon several affidavits, by which it appeared that the defendants were incorporated by 36 Vic. ch. 61, O., for the purpose of constructing and operating a street railway in the town of Sarnia and the adjoining municipalities: that by the said Act it is declared as soon as stock to the amount of \$10,000 had been subscribed, and 25 per cent. paid up, and a board of directors

elected, as provided in the said Act, the company might commence operations, and exercise the powers thereby granted to them: that a meeting of the shareholders was held on the 29th day of September, 1874, and a board of seven directors elected, and Joshua Adams was elected president: that one W. P. Edison was at the same time elected secretary, and one Stewart as treasurer: that at the same meeting arrangements were made for the construction of the street railway: that by a memorandum of agreement, dated 29th of December, 1874, signed by the president and vice-president, and Edison, as secretary of the company, of the one part, and Hickson, the general manager of the Grand Trunk Railway, of the other, it was agreed, in order to facilitate the construction of the railway, that the defendants should have the use of a certain quantity of iron rails for a term of years, and a right of way; and in consideration thereof the defendants agreed for the conveyance of such traffic as might be agreed on, over the defendants' street railway: that the railway was constructed under an arrangement with a contractor, and the first car was run over the same by such contractor about the 5th of July, 1875, although the same was not completed to its furthest limit in the town of Sarnia until late in the fall of that year: that no regular meeting of the directors was held between the 1st day of October, 1874, and the 15th of September, 1875, on which last day it was resolved that as the annual meeting of the company for the election of directors had not taken place, it was necessary, in pursuance of the charter, to fix a date by by-law for that purpose, which was done: that a meeting of the stockholders was subsequently, on the same day, held under the by-law, and a board of directors for the ensuing year was elected: that immediately after such meeting Mr. Adams was again elected as president, and one McRae vice-president, and Edison superintendent, and one Bonner secretary, and the said Stewart as treasurer: that the plaintiff's claim was the amount due for freight and storage November 1st, 1875, 2,681,629 lbs., at 2 cents, \$536.32;

and then to the 18th of December, 462,629 lbs., at $1\frac{1}{2}$ cents, \$69.39; total, \$605.71: that after the commencement of this action, and the filing of the declaration and pleas, and issue joined, the cause and all matters in difference between the parties were, by an order bearing date 7th December, 1876, referred to the award of J. P. Bucke, barrister-at-law: that the arbitrator by his award, bearing date the 31st of January, 1877, directed the defendants to pay to the plaintiffs \$576.18, and the costs of the reference: that the plaintiffs, in support of their claim, put in the memorandum of agreement, dated 8th April, 1875, as follows:—

“The steamer *J. C. Clarke* will ferry all merchandise for the street railway from the Grand Trunk depot to Sarnia, once a day, on her up trip, till opening of street railway; or merchandise to depot from town, on up trip, compensation to be agreed on. (Signed) W. B. CLARKE, Manager; W. BONNER, for W. P. Edison.”

That at the time of this agreement the defendants were not in operation; that Bonner at the time was not in the service of the company, but Edison was secretary: that neither of them had any authority, from the president or any of the directors, to enter into any such agreement on the part of the company: that neither the president nor any of the directors had any notice or knowledge of such an agreement, nor was any intimation thereof given by Clarke: that no application was ever made by Clarke to the president to fix or agree upon any compensation, as required by the memorandum: that Clarke never applied to any officer to fix such compensation during the season of 1875, nor at any subsequent time: that no claim was made by Clarke until the spring of 1876, at which time Edison repudiated all liability on the part of the defendants: that the memorandum was made on behalf of Edison, who was and is still superintendent of the Port Huron Car Company, and having dealings with the Grand Trunk R. W. Co. for the carriage of freight for some time previously to the agreement: that the defendants never received any benefit or advantage in respect of the carriage of the said freight prior to the 5th of July,

1875; and that there was no entry in any of the books of the defendants produced before the arbitrator of any receipt of any sum as paid by the Grand Trunk Co. on account of the freight prior to that date.

During Easter term, May 29, 1877, *J. A. McKenzie* shewed cause. The company had the power to make the contract: 37 Vic. ch. 61, sec. 4, 5, 6, 8, O.; *Howland v. McNab*, 8 Grant 47; *Re Michie and Huron and Ontario R. W. Co.*, 26 C. P. 566; *Brice on Ultra Vires*, 2nd ed., 39, 40, 70, 75, 91, 269, 270; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712; *South Wales R. W. Co. v. Redmond*, 10 C. B. N. S. 675; *Taunton v. Royal Ins. Co.*, 2 H. & M. 135; *Lyde v. Eastern Bengal R. W. Co.*, 36 Beav. 10, 16; *Gregory v. Patchett*, 33 Beav. 595; *Wilby v. West Cornwall R. W. Co.*, 2 H. & N. 703; *Great Western R. W. Co. v. Blake*, 7 H. & N. 987; *Coxon v. Great Western R. W. Co.*, 5 H. & N. 274; *Le Conteur v. London and South-Western R. W. Co.*, L. R. 1 Q. B. 54; *McDonald v. Upper Canada Mining Co.*, 15 Grant 179, 551; *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341; *Bissell v. Michigan Southern and Northern Indiana R. W. Co.*, 22 N. Y. 458. The defendants, having got the benefit of the contract, should not be permitted to argue that it is *ultra vires*: *Brice on Ultra Vires* 277, 517, 521, 522; *Hall v. Mayor, &c., of Swansea*, 5 Q. B. 526; and for the same reason are bound by the contract, although not under seal: *Pim v. Municipal Council of Ontario*, 9 C. P. 304; *Whitehead v. Buffalo and Lake Huron R. W. Co.*, 7 Grant 351.

Kerr, Q. C., contra. The company was not organized at the time the contract is alleged to have been made, and if organized the contract is not binding, because unauthorized, and because not under seal: *Hughes v. Canada Permanent Loan and Savings Society*, 39 U. C. R. 221; *Taylor v. Peterborough, Cobourg, and Marmora R. W. and Mining Co.*, 24 C. P. 200; *Attorney-General v. Great Western R. W. Co.*, 30 L. J., Ch. 17; *Hare v. The London and North-Western R. W. Co.*, 2. J. & H. 80; *Forrest v. Manchester*

and *Sheffield and Linconshire R. W. Co.*, 30 Beav. 40; *Hodges on Railways*, 6th ed., 34; *Copper Mining Co. v. Fox*, 16 Q. B. 229; *Brice on Ultra Vires*, 2nd ed., 512, 516; *Houck v. The Town of Whitby*, 14 Grant 671; *Calvin v. The Provincial Ins. Co.*, 20 C. P. 267; *McLean v. Town Council of the Town of Brantford*, 16 U. C. R. 347; *Nicholson v. Guardians of the Bradfield Union*, L. R. 1 Q. B. 620; *Great Western R. W. Co. v. Preston and Berlin R. W. Co.*, 17 U. C. R. 477.

November 19, 1877. HARRISON, C. J.—The defendants were incorporated on the 24th of March, 1874, by the statute 37 Vic. ch. 61, O.

The company is by section 7 empowered—

1. "To construct, maintain, complete, and operate a double or single iron railway, with the necessary side tracks, * * upon and along streets and highways within the jurisdiction of the corporation of the town of Sarnia." * *

2. "And to take, transport, and carry passengers and freight upon the same, by the force or power of animals, or such other motive power as they may be authorized by the council of the said town * * to use."

These are the declared objects for which the company is incorporated.

The directors by section 8 are empowered to make by-laws for the management of the company, and "in general, to do all things that may be necessary to carry out the objects, and the exercise of any powers incident to the company."

Directors were elected by the shareholders on the 29th of September, 1874.

The directors on the 1st of October, 1874, so elected, chose a president, and appointed a secretary and treasurer. Adams was the president, Edison the secretary, and Stewart the treasurer.

On the 29th December, 1874, an agreement was entered into between the defendants and the Grand Trunk R. W. Co. for the carriage of freight by the defendants for the

Grand Trunk R. W. Co. between Point Edward and the town of Sarnia. The Grand Trunk R. W. Co., by the loan of rails and otherwise, assisted the defendants to organize and to operate, but no car was run upon the defendants' line of railway till the 5th of July, 1875, and the line was not ready for operation till late in the fall of 1875.

In the month of April, 1875, it is said that the defendants, for the purpose of fulfilling their contract with the Grand Trunk R. W. Co., entered into the agreement relied upon by the plaintiff, which is for the transport of merchandise from the Grand Trunk Railway depot at Point Edward to Sarnia by water, till the opening of the street railway, compensation to be agreed on.

This agreement is not under the seal of the defendants, and is signed by the plaintiff and by "W. Bonner, for H. P. Edison."

In the month of September following there was a meeting of the directors, and Edison was for the first time appointed superintendent, and Bonner secretary of the company. Merchandise was carried by the plaintiff under the agreement, from the date of it, till the 18th of December, 1875, and for this service the action is brought.

It was proved that for the service from the 1st of July, 1875, and until the 18th of December, 1875, the defendants had received from the Grand Trunk R. W. Co. more than the amount claimed by the plaintiff in this action for the service which the plaintiff had performed.

Still the defendants deny that there was any contract between them and the plaintiff for the performance of any such service, or any liability for the payment of compensation therefor. It cannot be denied that the contract, if any, of the plaintiff with the defendants has been executed, and has been a benefit to the defendants.

Should the defendants, under these circumstances, be permitted to contend either that there was no contract, because of the want of a seal, or that the contract, even if sealed, was *ultra vires*? These were the two questions principally discussed before us.

The defendants are not empowered to carry freight by water. The contract, supposing it to be otherwise the contract of the defendants, is therefore *primâ facie ultra vires*. But it may, without violence to any of the decisions on the point, be held that for a temporary purpose the defendants, after the completion of their railway, would have, as incident to the object of their incorporation, power, to carry freight by water. See *Simpson v. The Westminster Palace Hotel Co.*, 8 H. L. C. 712. The company are by section 15 of the Act empowered to substitute sleighs for railway carriages during the winter months. If at any time their road, after completion, becomes impassable, and the highway by the river was open, we could see no objection to the use of the river. But here the contract, if any, was made before the line of railway was fit for use, and in advance of the authorized operations of the company. This is the difficulty in the way of holding that the contract was, when made, one within the power of the company.

If we should be of opinion that the defendants, having derived substantial benefit from the services of the plaintiff, ought not to be allowed to raise the question of *ultra vires*, it will be unnecessary to give an opinion on the question of power presented for decision.

The cases on the doctrine of *ultra vires* are numerous. It will not be necessary to refer to many of them. They shew that when acts are spoken of as *ultra vires*, it is not intended that they are prohibited, but merely such as are not within the powers, directly or indirectly, conferred on the corporation. To the extent that these acts authorize an application of the funds of the company otherwise than to the purpose for which the shareholders were incorporated, the Acts are clearly *ultra vires*: *Taylor v. Chichester and Midhurst R. W. Co.*, L. R. 2 Ex. 356. It appears to follow that a corporation ought not to be allowed to avail itself of the doctrine of *ultra vires* as against a party seeking to enforce the contract which has been performed by him, and has resulted in a corresponding benefit to the shareholders: *Ex parte Chippendale*, 4 DeG. M. & G. 19;

Bank of Australasia v. Breillat, 6 Moore P. C. 152; *McDonald v. The Upper Canada Mining Co.*, 15 Grant 179; *The Whitney Arms Co. v. Barlow*, 20 Am. 504.

The case most nearly in point is *The State Board of Agriculture v. The Citizens' Street R. W. Co.*, 17 Am. 702. The defendants, a street railway company, as an inducement to the plaintiffs to locate the annual state fair upon a plot of land north of the city of Indianapolis during the years 1868, 1869, 1870, agreed to pay the plaintiffs for each of the said years \$1,000. The performance of the agreement by the plaintiffs was a benefit to the defendants. By means of it they received increased gains from passenger travel. In an action by the plaintiffs for the money payable under the agreement, the defendants contended that the contract was *ultra vires*. But the Court refused to give effect to the objection, saying: "It is fully shewn on the part of the plaintiff that the State Board of Agriculture performed the contract on its part. The street railway company has thus received the benefit and advantages of the contract, but seek to avoid paying the consideration promised because it had not the legal power to contract for the benefits which it has actually received. In our opinion the street railway company is not entitled to assume this position. It has received the profits resulting from the compliance of the plaintiffs with the contract. These profits, we are at liberty to presume, have gone to swell the dividends of the shareholders in that corporation. It would be unjust for the corporation now to escape performance of the contract by which these profits have been realized."

We cannot do better than follow the law as enunciated in this case. It is applicable here, and it commends itself to our reason.

To the extent, therefore, that the defendants have benefited by the services of the plaintiff, they ought not, we think, to be allowed to raise the question of *ultra vires*. There was no proof of any benefit before the 1st of July, 1875. After that day the defendants, according to their

books, regularly received from the Grand Trunk R. W. Co. payment for the services in respect of which the plaintiff now sues.

If there was an actual binding contract for the payment of these services, or if, on the facts, the law will imply a contract to pay for them, the plaintiff is entitled to recover.

The cases as to when a contract under seal is or is not necessary, are very numerous. Many of them were noticed in *Hughes v. The Canada Permanent Loan and Savings Society*, 39 U. C. R. 228. While there stating the general rule to be that a corporation can only contract under its corporate seal, we pointed out several well established exceptions to that rule. One of them is where the contract, if any, has been executed and the corporation has got the benefit of it. If there was a contract at all here the case appears to come under that exception.

We are not by any means inclined to hold that the defendants were in any sense bound by what is called the written contract here made. It was not only not sealed with the seal of the defendants, but was not signed by any officer who at the time had any pretence of authority for binding the defendants. The person who signed it was Bonner. He was not at the time an officer of any kind in the employment of the defendants. He signs, not for the defendants, but "for H. P. Edison." Edison admits his authority to sign so as to individually bind him, Edison, but denies that there was any authority directly or indirectly to bind the defendants. It names no sum as the compensation for services therein authorized. There was no payment of any sum by the defendants thereunder. There was no subsequent agreement as to compensation. We fail therefore to see any conduct on the part of the defendants which can be held to be a recognition or adoption of that contract.

But the law, under the circumstances, would, in our opinion, imply an agreement on the part of the defendants to pay for the plaintiff's services after the 1st of July, 1875. There is no complaint that the amount allowed by

the arbitrator for these services is excessive. But we are unable to separate the amount allowed before the 1st of July, 1875, from that allowed after that day. Unless the parties agree upon the deduction to be made from the amount of the award, the rule must be absolute to refer the matter back to the arbitrator to ascertain the amount, the costs of the reference to be in his discretion. If they agree as to the amount, the rule will be absolute to reduce the award by that amount. In any event no costs of this application.

MORRISON, J., and WILSON, J., concurred.

Rule accordingly.

HUGHITT V. SAXTON.

Foreign judgment for costs of defence—Assignment of—Insolvency of defendant—Rights of his assignee—Proof of judgment.

In an action on a foreign judgment, it appeared from the roll that the judgment was on a bill of complaint brought in the State of New York, against S. and his wife, by one Saxton (the now defendant,) to set aside a certain conveyance made to the wife as fraudulent, and that such bill was dismissed with costs to be paid by the plaintiff, (the now defendant.) It appeared also that the suit was substantially against the wife, her property being in dispute, and that her husband was joined for conformity only. An assignment of the judgment was produced from S. and wife to the now plaintiff, and a previous assignment, during the pendency of the foreign suit, of all costs accrued or that might accrue. It was admitted on behalf of the now plaintiff, that at the execution of the assignment S. was an insolvent under the Act of 1869, and that the now plaintiff was the attorney of S. and his wife in the foreign Court.

Held, that the plaintiff was entitled to recover, for *primâ facie* the costs for which the judgment was recovered were incurred and recovered by the wife, and did not pass to the assignee of her husband.

Held, also, upon the evidence set out below that the judgment was properly proved, for the certificate shewed the person certifying to be the clerk and the seal to be the seal of the Court.

DECLARATION upon a foreign judgment, recovered in the state of New York, against the now defendant, which judgment was assigned by John Stevenson, and Phœbe E. Stevenson, his wife, to the plaintiff, said Stevenson and wife being the defendants in the said judgment, the sum recovered being \$460.49, equivalent to \$437.50 of Canadian currency, which was adjudged and ordered to be paid to Stevenson and his wife, the same being costs in the foreign suit.

Pleas: 1. Never indebted. 2. No assignment. 3. A special plea: That Stevenson was married before the passing of the Married Woman's Act of 1872, and that the said wife of Stevenson, at the time of the assignment, had no property or interest in said judgment mentioned; but the judgment was vested in, and was the sole property of, said Stevenson, and before the assignment the said Stevenson became and was insolvent, and had not obtained his discharge, and the right to the said judgment debt of the said Stevenson became vested in his assignee, who was, from the recovery

of the judgment, and now is, entitled to all the benefit and advantage to be derived from the same, &c. 4th plea. Set off: first averring that at the time of the assignment, Phoebe E. Stevenson had no property or interest in the judgment; and that before the assignment Stevenson was indebted to the defendant in an amount greater than the plaintiff's claim under the assignment, for money payable by Stevenson upon a judgment recovered by the defendant, in October, 1870, in the Supreme Court of the State of New York, against Stevenson, for \$19,494.66 and costs, which judgment is in force and unsatisfied. And upon money payable by Stevenson to the defendant upon a judgment recovered by the defendant in June, 1874, against Stevenson for the sum of \$13,286.00 with costs.

Issue.

The case was tried before Gwynne, J., at the Napanee Spring Assizes, 1877.

At the trial an exemplification of the judgment declared on was put in, as follows: "The people of the state of New York, by the grace of God free and independent: Know ye we have examined the files of the office of the clerk of the county of Cayuga, in said state of New York; do find therein a certain judgment roll, in words and figures following—that is to say:—[Then follow the pleadings.] Supreme Court, county of Cayuga, *James A. Saxton* against *John Stevenson and Phæbe Eliza Stevenson, his wife*.

The judgment appeared to be entered December 6th, 1875, ending as follows: "It is adjudged that the complaint herein be dismissed on the merits of the action, and that the defendants recover off the plaintiff, James Saxton, \$460.49."

Attached to the same was the following certificate:—
"State of New York, Cayuga county, s. s.: I, Sidney J. Westfall, clerk of the county of Cayuga, and of the Supreme Court of said state, it being a Court of Record, and having a common seal, do hereby certify that I have compared the above and foregoing copy of the judgment roll with the original thereof, now remaining on file in my office, filed

December 6th, 1875, at 12 M., and that the same is a correct copy of such original, and of the whole thereof. In testimony whereof I have hereunto set my hand, and affixed the seal of the said county, and of said Court, at Auburn, New York, the 17th day of March, A. D. 1877."

(Signed) S. J. WESTFALL, Clerk.
(And seal)



Also, there was attached a certificate of Charles C. Dwight, one of the Justices of the Supreme Court in the seventh judicial district of the state of New York, certifying that the county of Cayuga is included in said district, and that S. J. Westfall was clerk of said county and of said Court, and that said Westfall, county clerk aforesaid, made such certificate, and said certificate and attestation are in due form of law, and that the foregoing record, attestation, and certificate, are entitled to full faith and credit as evidence thereof in any Court in this (New York) state. Dated Auburn, 19th March, 1877. Signed, Charles C. Dwight, Justice, &c.

Also an assignment by Stevenson and wife, of the judgment, dated the 14th of August, 1876, to the plaintiff. Execution admitted.

Also an assignment or document purporting to be an assignment from Stevenson and wife, dated 26th of October, 1875, to the plaintiff during the pendency of the suit in the foreign Court, assigning all costs accrued, or which might accrue, thereafter.

It was admitted, on behalf of the plaintiff, that at the time of the execution of the assignment Stevenson's estate was vested in the assignee in insolvency, he being insolvent

under the Insolvent Act of 1869. Also, that the plaintiff was the attorney of Stevenson and wife in the action in the foreign Court.

It was objected that the seal did not appear to be the seal of the Court, but of the county.

On the part of the defendant, an exemplification of judgment recovered by the now defendant against John Stevenson, in the Court of Common Pleas, on the 15th of June, 1874, for \$13,286.

It was admitted that Stevenson and his wife were married thirty years ago.

It was represented to the learned Judge that the suit in which judgment was obtained in the state of New York was substantially against the married woman, the husband being only joined for conformity.

The learned Judge entered a verdict, *pro formâ*, for the plaintiff, the defendant's counsel to be at liberty to raise such points as could be raised in the Court above. A verdict was entered for the plaintiff for \$437,45. The amount was not disputed if the plaintiff was entitled to recover.

During Easter term last, May 23, 1877, *Clute* obtained a rule calling on plaintiff to shew cause why a nonsuit or verdict for the defendant should not be entered, or why the verdict should not be reduced to the sum of \$218.75, upon the ground that the alleged judgment was not proved: that there was no evidence of any valid assignment of said judgment to plaintiff having been given; the property in said judgment was that of Stevenson, and passed to his assignee in insolvency prior to the assignment to plaintiff. Also, on the ground that the half interest in said judgment belonged to Stevenson, and passed to his assignee in insolvency; and the plaintiff cannot recover in any case more than one-half the amount, and that defendant was entitled to set off the judgment mentioned in the fourth plea. It was not proved that the defendant had assets, as required by the Administration of Justice Act of 1874.

During the same term, May 30, 1877, *Reeve* shewed cause, and cited *Woodruff v. Walling*, 12 U. C. R. 501; *Roe v. Smith*, 15 Grant 344; *Tilton v. McKay*, 24 C. P. 94.

Clute supported his rule, citing *Junkin v. Davis*, 6 C. P. 408; *Roper* on Husband and Wife, vol. i., pp. 225, 226, 227; *Balsam v. Robinson*, 19 C. P. 263.

November 19, 1877. MORRISON, J.—The first point arising in this case is, whether the foreign judgment, upon which the plaintiff sues, was properly proved at the trial. The case of *Junkin v. Davis et al.*, 6 C. P. 408, to which we were referred by the defendant's counsel, is quite distinguishable, and the certificate in this case meets the objection taken in the case of *Woodruff v. Walling*, 12 U. C. R. 501, for it shews clearly on its face that the person certifying is the clerk of the Supreme Court, and that the seal attached is the seal of that Court, so that I think the judgment was sufficiently proved.

The principal question remaining is, whether the plaintiff is entitled to recover under the assignments of the judgment in question. It was objected that the foreign judgment, being a recovery for the costs of defence in a suit in which the now defendant was plaintiff, and John Stevenson and Phoebe Stevenson his wife were defendants, and John Stevenson being at the time of the assignments of the judgment to the plaintiff an insolvent, that the assignee of Stevenson was entitled to such costs, and that no valid assignment of the judgment or the costs could be made to the plaintiff. Now it appears, by the foreign judgment roll, that this defendant, having recovered several judgments in the Supreme Court of the state of New York against John Stevenson and others for large amounts, and executions being issued thereon, and the sheriff having returned that Stevenson had no real or personal property to satisfy the executions issued upon such judgments, this defendant filed a bill of complaint in the Supreme Court of the state of New York to set aside a certain conveyance made to

Phoebe Stevenson by one Thompson and another of certain lands situate in that state, alleging that such conveyance was made without consideration from Phoebe Stevenson, and that the same was fraudulent, and made to her as a mere pretence and cover of property for the benefit of John Stevenson, her husband, and praying that she be required to pass the title of such lands by a proper conveyance to her husband, and that the plaintiff, this defendant, should have leave to collect the amount of his claims by execution levied upon such lands and real estate, and that the proceeds of such lands might be applied to Stevenson's debts: that, upon the cause being tried and heard, it was held and decided on the merits that the deed from Thompson *et al.* to Phoebe Stevenson was a valid conveyance to her, and that the now defendant's complaint be dismissed, with costs to be paid by the now defendant.

Now, it appears by these proceedings that Mrs. Stevenson was the real defendant in that suit, and that it was the right to her property that was in dispute, her husband's name being introduced into the bill of complaint, obviously as a matter of form, and it appears by the learned Judge's notes of the trial, that it was represented to him that the suit in question was substantially against the wife, the husband being only joined for conformity.

No evidence was given at the trial of this cause to shew that the insolvent had any beneficial interest in these costs, or that he contributed anything towards the expenses of the defence of the suit in the foreign Court, or that he retained any person to appear for him; and it does not appear when Stevenson became insolvent. It is most probable he was insolvent at the time the foreign suit was instituted.

The Insolvent Laws only profess to vest in the assignee that which is the property of the insolvent himself, or moneys or debts to which he is entitled in law or equity.

I may here remark that the plaintiff, to whom these costs were assigned, was the solicitor on the record who conducted the defence for Mrs. Stevenson in the Supreme

Court, and so *primâ facie* the person to receive the costs, and if they had been recovered from this defendant under an execution issued on the judgment, I do not think that the assignee 'could have recovered them back from the plaintiff as money belonging to the insolvent; and I think also that it is clear that the plaintiff could have sued Mrs. Stevenson and recovered the amount of these costs from her, and could still do so if the plaintiff has not taken the assignments of the judgment in satisfaction of the costs. Neither does it appear that the assignee has in any way intervened or ever made claim to these costs.

If this defendant satisfied the foreign judgment by payment either to Mrs. Stevenson or to this plaintiff, I cannot see that his so doing would result in any injury to him. I cannot find any authority bearing directly on this question.

On the whole it seems to me as the case stands, *primâ facie*, these costs were costs incurred by the wife and recovered by her in defending her rights to her own property, and that she had control over the judgment and could assign it to this plaintiff.

The rule will therefore be discharged.

HARRISON, C. J., and WILSON, J., concurred.

Rule discharged.

DEMOREST v. MILLER.

Voluntary Deed—27 Eliz. ch. 4—Abandonment of claim.

In ejectment, the plaintiff claimed under a deed from her father, made in 1846, on the day after her marriage, expressed to be in consideration of natural love and affection, and of £5, in fee, reserving, however, the use and occupation of the premises to the grantor and his wife during their lives and the life of the survivor; and on condition that the plaintiff should cause the land to be properly cultivated and furnish a comfortable maintenance and support to the grantor and his wife for the remainder of their respective lives; and also that, after their decease, the plaintiff and her heirs should pay to each of her sisters £25. No other condition was proved except as above expressed. The plaintiff and her husband lived with her father and mother on the land for several years, but separated in 1854, and went to the United States, having had constant disagreements, and did not return until 1876. In 1854, the father sold and conveyed the land for value to the defendant.

Held, WILSON, J., dissenting, that the deed to the plaintiff must be regarded as a voluntary deed, there being no binding agreement to perform the condition as to maintenance, &c., or to pay the sums named to the sisters; and that it was therefore void under the 27 Eliz. ch. 4, as against the defendant, a subsequent purchaser for value, though with notice.

Per WILSON, J., the evidence as to whether the plaintiff in 1854, abandoned the land and all claim to it or only during the life of her parents, was not sufficient to warrant the inference of abandonment. *Per* HARRISON, C. J., such conclusion might fairly be drawn from it.

The 31 Vic. ch. 9, O., did not apply to the case, defendant's deed having been obtained before 28th February, 1868.

THIS was an action of ejectment, brought on the 30th of May, 1876, for the recovery of the west half of lot 23 in the first concession of the township of Ernestown, and tried before Wilson, J., without a jury, at Napanee, in the Spring of 1877.

The land at one time belonged to Abram Amey, under whom both parties claimed.

The plaintiff claimed title under a deed from Abram Amey to her.

The defendant limited his defence to the west half, excepting twenty-five acres conveyed by Abram Amey to Charles Thomas, and claimed by several modes of title.

1. By deed from Abram Amey to Alpheus Miller, and from Alpheus Miller to the defendant.

2. By length of possession, for twenty years and upwards.

3. For defence on equitable grounds, that the deed under

which the plaintiff claimed was made by Abram Amey to the plaintiff, on condition expressed in the said deed, that the plaintiff should cause the said land to be properly cultivated, and should furnish a complete maintenance and support to the said Abram Amey and Charity Amey, his wife, for the then remainder of their respective lives; and that the plaintiff should, after the death of the said Abram Amey and Charity Amey, pay to the four sisters of the plaintiff, Margaret Ann, Lavinia, Amelia, and Martha, the sum of twenty-five pounds each—alleging non-performance of these conditions, and also alleging rescission of the agreement by consent of Abram Amey and the plaintiff, and the surrender of the land by plaintiff to Abram Amey, who afterwards conveyed to Alpheus Miller, under whom defendant claimed.

The plaintiff was married to her present husband on the 25th of March, 1846.

On the following day her father conveyed to her, described as a married woman, the land in question, for the consideration expressed “of the natural love and affection that he bears to his said daughter, and for the further consideration of five pounds of lawful money of Canada. To have and to hold the said granted premises with all the privileges and appurtenances to her, the said Lucintha Demorest, her heirs and assigns, to their own use forever; reserving, however, the use, occupation and income of the said premises to the said Abram Amey and Charity Amey, his wife, during their natural lives, and the life of the survivor of them; and on the condition that the said Lucintha Demorest shall cause the said land to be properly cultivated, and shall furnish a comfortable maintenance and support to the said Abram Amey and Charity Amey for the remainder of their respective lives; and also that the said Lucintha Demorest and her heirs shall, after the decease of the said Abram Amey and Charity Amey, pay or cause to be paid to each of her sisters, Margaret Ann, Lavinia, Amelia, and Martha, the sum of twenty-five pounds currency each.”

This deed was not produced at the trial. It was said to have been destroyed or lost in the United States, and a memorial only of it, registered on the 1st of August, 1846, was produced and proved. The deed, according to the affidavit endorsed on the memorial, was executed by the grantor and the plaintiff.

It did not appear that the grantor owned any other land than the property described in the deed.

There was no evidence of the payment of any money at the time of its execution.

The only consideration proved was the consideration, if any, expressed.

The plaintiff and her husband took possession of the land. They and her father and mother lived together in the same house. Shortly afterwards difficulties arose between the two families and they separated, the plaintiff and her husband going to the United States. But again they returned at the request of her father, and lived on the land for about five years. The plaintiff's husband built a barn, a carriage house and shed, in all worth about \$420. But it was said he sold timber off the land worth more than that amount. He cleared from twenty-five to thirty acres of the land. Difficulties, however, never ceased between the parties, and in June or July, 1854, a final separation took place.

The dispute was as to what really did take place at the time of the separation.

The following instrument was, on 13th June, 1854, prepared for execution by a lawyer in Kingston, but was, for some reason, never executed :

"In consideration of John Demorest and Lucintha, his wife, surrendering up to me peaceable possession of the west half of lot twenty-three in the first concession of Ernestown, for my occupation, pursuant to the terms of my deed of twenty-sixth of March, 1846, to Lucintha Demorest, which they have this day done, I agree to harvest the crop now in the ground, and to give them one-third of the whole, deliverable by me on the premises of William Armstrong, adjoining; and I further agree to and do hereby

release them from all claims for cultivating the said lot for support during my life, having determined to occupy the said lot myself during my life.

“Witness :

Dated 13th June, 1854.

[L. S.]”

Isaac Sterling, a witness examined at the trial, swore that the above was given to him to make two copies—one for each party—and which he swore he did. But the defendænt insisted the instrument was never executed, because Amey required and got another prepared by Sterling, by which the plaintiff and his wife gave up their whole interest in the land, and not merely the right to occupy and work it for the life of Amey and his wife, &c.

The following instrument, in the handwriting of Isaac Sterling, was proved to have been executed on the 14th of June, 1854:—

“We hereby agree to surrender to Abram Amey possession of the west half of lot number twenty-three in the first concession of Ernestown, within a week from this day, under a penalty of twenty-five pounds to be paid by us if we don’t leave. This is in consideration of his having agreed to give us one-third of the crops now in the ground, and having released us from all liability for cultivating the land or maintaining him during his life.

“JOHN DEMOREST,

“LUCINTHA DEMOREST.

“Witness :

“ISAAC STERLING,

“BILLINGS HARTMAN.”

This instrument was produced from the custody of one of the daughters of Abram Amey after his death.

It was contended on the part of the defence, that it was part of the agreement between the parties at the time of the separation, that the deed to the plaintiff should be destroyed, and there was evidence that some such paper was afterwards destroyed. But Sterling swore that, so far as he was aware, there was no agreement that the deed to the plaintiff should be given up, and that he read over to Amey what he had written, and asked him if it was the

agreement between them, and the latter said it was correct.

The plaintiff left Canada for the United States in July, 1854, and never returned to Canada till June, 1876. Her father died on the land in 1850. He was then about eighty years old. Her mother died in 1870, in Rochester, at the residence of one of her daughters.

The father, on the 11th of November, 1854, by deed of that date, registered on the 13th of November, 1854, conveyed the land to Alpheus Miller, a brother-in-law of the plaintiff, for the expressed consideration of £375, taking back a bond conditioned for the payment of the amount by twelve equal annual payments of £31 5s., with interest on each instalment as it became due.

The payment of the purchase money was proved.

Alpheus Miller, in March, 1859, conveyed the land to the defendant George Miller for the expressed consideration of £400.

The land, at the time the plaintiff left Canada, was variously estimated from \$4,000 to \$7,000 in value.

The principal question in dispute at the trial was, whether the plaintiff, in leaving the farm in June, 1854, abandoned all right to the farm, or only the occupation of it for the life of her father.

While the learned Judge thought that the conduct of the plaintiff looked like an abandonment, he was of opinion that the evidence of Sterling and others, taken in connection with the writings, was more satisfactory than the mere recollections of some opposing witnesses, unfortified by documentary evidence, and so found a verdict for the plaintiff.

During Easter term, May 25, 1877, *Wallbridge*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict rendered for the plaintiff in this cause should not be set aside and a verdict entered for the defendant, pursuant to the Administration of Justice Act, on the ground that the verdict is contrary to law and evidence: that the evidence shewed that the condition to support Abram Amey

and his wife, contained in the deed from Abram Amey to the plaintiff, was not performed; but the plaintiff abandoned the property and the said Abram Amey and wife, and did not support them: that the agreement under which it was alleged the said Abram Amey had discharged the plaintiff from such performance was not proved so as to entitle the plaintiff to treat the condition as released; and the plaintiff, if such obligation to support was released, would then hold the deed without value, and the defendant is a purchaser for valuable consideration.

During the same term, June 6, 1877, *Reeve* shewed cause. The deed of the 26th of March, 1846, is a good deed of the reversion to the plaintiff: *Hartman v. Fleming*, 30 U. C. R. 209. It is not a voluntary deed within the meaning of *Beeman v. Knapp*, 13 Grant 398. The evidence shews that the plaintiff never abandoned anything except the right to interfere with the control of the land during the life-time of her father.

Wallbridge, Q. C., contra. The conveyance to the plaintiff was clearly voluntary within the meaning of *Beeman v. Knapp*, 13 Grant 398. It contains no covenant for the support of the father and mother. Besides, if it did, it would be void, as the grantee was a married woman. And according to the weight of evidence, it appears that the plaintiff surrendered and abandoned all claim to the land more than thirty years ago.

November 24, 1877. HARRISON, C. J.—The deed under which the defendant claims was a deed made for a valuable consideration, all of which was proved to have been paid.

The question is, whether that deed shall prevail against the prior deed, under which the plaintiff now seeks to regain possession.

The defendant resists the claim under the plaintiff's deed:

1. Because it was a voluntary deed, and so void as against the defendant's deed for value.
2. Because whatever right it did pass to the plaintiff was

surrendered by her when she abandoned the land and all interest in it.

As the defendant's father received his deed before the passing of the Act 31 Vic. ch. 9, O., the case is, by the second section of that Act, excluded from its operation.

We must, therefore, dispose of the case under 27 Eliz. ch. 4, without reference to the 31 Vic. ch. 9, O.

The statute of Elizabeth must receive the same construction and produce the same effect in Courts of law and equity: See per Sir William Grant in *Buckle v. Mitchell*, 18 Ves. 100.

If the deed to the plaintiff is, under 27 Eliz. ch. 4, to be deemed a voluntary deed, the fact that the defendant, or the person under whom he claims, had notice of it does not, apart from 31 Vic. ch. 9, O., prevent the operation of the statute: *Doe d. Otley v. Manning*, 9 East 59.

In *Buckle v. Mitchell*, 18 Ves. 100, Sir William Grant said, at p. 110: "It must, I conceive, be assumed that the statute of the 27th Elizabeth has now received this construction; that a voluntary settlement, however free from actual fraud, is by the operation of that statute deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even when the purchase has been made with notice of the prior voluntary settlement."

Similar language will be found in *Hewison v. Negus*, 16 Beav. 594; *Doe d. Newman v. Rusham*, 17 Q. B. 723, 725; *Wilson v. Wilson*, 8 C. P. 525; *Bayspoole v. Collins*, L. R. 6 Ch. 228.

A voluntary deed under the statute is simply a deed without valuable consideration.

The question of consideration must be decided by the state of circumstances when the deed was made, and not merely by the light of subsequent events.

If there was no valuable consideration for the making of it, it is none the less voluntary because made on what is called a meritorious consideration, as when made in the fulfilment of the moral duty of husband or parent to provide for his wife or children: *Goodright d. Humphreys v.*

Moses, 2 W. Bl. 1019; *Chapman d. Staverton v. Emery*, Cowp. 278; *Doe d. Otley v. Manning*, 9 East 59; *Cotterell v. Homer*, 13 Sim. 506; *Willats v. Busby*, 5 Beav. 193; *Daking v. Whimper*, 26 Beav. 568; *Clarke v. Wright*, 6 H. & N. 849, 875.

If there be any valuable consideration for the making of the deed, the Court will not feel disposed to weigh it closely with a view to decide its adequacy: *Thompson v. Webster*, 4 DeG. & J. 600.

In *Townsend v. Toker*, L. R. 1 Ch. 446, a lady who was entitled in fee to an estate subject to mortgages, proposed to her nephew that she should come and live with him, and that he should remove into a larger house for the purpose, she contributing a yearly sum towards the housekeeping. The nephew agreed to this, provided she would settle the estate, limiting it to him after her death. She agreed to this, and a settlement was accordingly executed, by which the nephew covenanted to indemnify her from all liability in respect of the mortgages, except the payment of the interest during her life. He moved to a larger house at considerable expense, and they lived together for some time. But the aunt afterwards ceased to live with the nephew and agreed to sell the estate to a purchaser. The Master of the Rolls held the deed to be voluntary; but the Lords Justices reversed his decision, holding that the covenant of indemnity and the expenses incurred by the nephew were severally sufficient to support the deed as made for value. Reference may also be made to *Hewison v. Negus*, 16 Beav. 594; *Doe d. Phillpott v. Blanchfield*, 1 U. C. R. 350; *Bayspoole v. Collins*, L. R. 6 Ch. 228; *Teasdale v. Braithwaite*, L.R. 4 Ch. D. 685, affirmed L.R. 5 Ch. D. 630. *Price v. Jenkins*, L. R. 4 Ch. D. 483, reversed L. R. 5 Ch. D. 619.

There was no attempt made at the trial, in the case now before us, to support the deed on the ground that the plaintiff had put herself to any inconvenience on the promise of the making of the deed, apart from the consideration expressed on the face of the deed, to which I shall hereafter refer.

In *Rosher v. Williams*, L. R. 20 Eq. 210, where the deed contained a covenant by the grantee under specified circumstances to build a house on part of the estate conveyed in a limited time, it was held that the covenant raised no consideration affecting the voluntary nature of the contract.

It is true that in the delivery of judgment, Malins, V. C., said, p. 219: "If he (the settlor) had said that unless the house were built the deed shall be void, and had reserved a power of re-entry on that event, that would have been a different thing."

I cannot, however, regard this as otherwise than an *obiter dictum*; and I know of nothing to support it.

The learned Judge adds: "At all events, no consideration is shewn moving from the grantee to the grantor. Therefore, as the grantor by the grant does nothing but deprive himself of the property and gets nothing in return, it seems to me, after all I have heard, that this must be a purely voluntary deed."

The promise of the person to whom the conveyance was made to improve his own land, is no consideration moving to the settlor or to any body. It is a *nudum pactum*. It does not cease to become a *nudum pactum* because of a right of re-entry in the event of non-performance of the promise. The remedy must not be confounded with the right. The promise is void. But in the event of non-performance the settlor's remedy, if dissatisfied, is to re-enter. The deed, whether containing a condition for re-entry or not, is, in my opinion, equally void because, in either case, of the entire absence of valuable consideration for the making of it.

The existence of a power of re-entry for non-performance of a condition cannot, in my opinion, on the question whether a deed is voluntary or not, be of any greater value than the absence or presence of a power of revocation. And it is now decided that the latter is of no value in the consideration of such a question: *Phillips v. Mullings*, L. R. 7 Ch. 244.

In *Leech v. Leech*, 11 Grant 572, where the father, being

the owner of the land, conveyed part of it to his son as a settlement for past services by the son to the father, although not so expressed in the deed, and the deed concluded as follows: "James Leech (the son), of the second part, is to till the said farm as usual, and to give his father, William Leech, of the first part, one half of the produce if demanded by the said William Leech of the first part," the deed was held not to be voluntary.

The deed which was executed by both parties, it will be observed, on the face of it contained a covenant on the part of the son to give the father one half of the produce if demanded, and so, independently of the consideration of past services, was for a valuable consideration.

But in *Beeman v. Knapp*, 13 Grant 398, a conveyance by a man, eighty-four years of age, of his farm, which was almost his only means of support, to his married daughter, subject to a proviso that she should properly maintain him, but with no personal liability on the part of any one to see to his maintenance, was held to be a voluntary deed.

The deed, as I gather from the report, was on the face of it subject to the proviso or condition "that the daughter should provide and supply a comfortable subsistence for the support and maintenance of the grantor during his life-time in such a style of living as he had heretofore been accustomed to, and that he should have the free use during life of the dwelling house now occupied by him on the lot."

It appears to me that this case is an authority in favour of holding the deed void in this case, if the only condition were the one as to maintenance of the father.

The further condition, that there was to be a payment by the daughter to each of her sisters, does not, in my opinion, alter the case.

There is no promise on the part of the plaintiff, or of anybody else, that she would do either of these things, and the only penalty for non-performance would be the loss of the land either at law or in equity.

The sisters of the plaintiff are in no better position than the plaintiff herself. The deed is a voluntary deed as regards them. The meritorious consideration is not sufficient to support it. It makes no difference whether the voluntary conveyance be directly to the beneficiaries or to another in trust for them. If to a trustee, and there be nothing but a meritorious consideration to support the claims of the *cestui que trusts*, the conveyance as against a subsequent deed for value is void under the statute: *Lister v. Turner*, 5 Hare 281.

Every voluntary conveyance made, however free from actual fraud, where afterwards there is a subsequent conveyance for valuable consideration, is now beyond controversy held, under the statute 27 Eliz. ch. 4, (subject to the provisions of our statute 31 Vic. ch. 9, O., which is inapplicable here,) void both at law and in equity as against the subsequent conveyance: *Townshend v. Windham*, 2 Ves. Sr. 1, 10; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 90.

For these reasons I am of opinion that the deed to the plaintiff must be held to be a voluntary deed.

The principle on which voluntary conveyances have been uniformly held to be fraudulent and void as against subsequent purchasers appears to be, that by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shews his intention to sell, as that it shall be taken conclusively against him and the person to whom he conveyed that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser: per Campbell, C.J., in *Doe d. Newman v. Rusham*, 17 Q. B. 723, 724. See further *Doe d. Proudfoot v. McCrae*, 6 O. S. 502; *Garside v. King*, 2 Grant 673.

Thus, that in which there is *de facto*, and from the nature of the case, no fraud or fraudulent intention whatever, is declared fraudulent by an arbitrary legal presumption: *May on Fraudulent Alienation* 176; *Story's Eq. Jur.* sec. 424, *et seq.*

In some cases this presumption may have worked hard-

ship, but in the present it is, I think, the handmaid of justice.

Besides, whether I consider the conduct of Abram Amey, the father of the plaintiff, or the conduct of the plaintiff herself, it would seem to me that neither party, after June 1854, intended the deed under which the plaintiff claims to have any binding operation.

If it were necessary for me to rest my decision against the plaintiff on the ground that the plaintiff had, in 1854, surrendered all claim to the land, I would feel myself fully warranted in drawing that conclusion from the evidence.

The non-production of the deed by the plaintiff is consistent with the destruction of it, as asserted on the part of the defence. The fact that for more than twenty years the plaintiff never in any manner looked after her supposed interest in this valuable farm, is only consistent with the belief that she had no interest whatever in it. Her conduct throughout is, I think, far more consistent with this than the contrary conclusion, and in my opinion outweighs the inference which might otherwise be drawn from the fragmentary writings produced at the trial.

The rule *nisi* should, in my opinion, be made absolute to enter the verdict for defendant.

MORRISON, J., concurred.

WILSON, J.—I have given the reasons at length in giving the verdict why I came to the conclusion that the plaintiff did not give up the deed which she got from her father the day after her marriage of the land in question; and that she did not leave the land or abandon it by way of giving up all claim or title to it, so that the Statute of Limitations could have commenced to run against her, even assuming she was not under the disability of coverture at the time.

I see no reason for changing my opinion on the facts of the case.

As to the deed which was made to the plaintiff by her

father being a voluntary deed, and so void against the defendant, who is the heir-at-law of a purchaser for value, I am of opinion it was not a voluntary deed. It will be observed she does not get the beneficial present estate in the land, but only after the deaths of the grantor and his wife, the father and mother of the plaintiff; and although the deed is not very accurately drawn to give such estate plainly at law to the grantor, it is of little consequence, because the deed shews the arrangement distinctly between the parties; and if the deed could not be construed as a covenant to stand seized, which probably it might be, a Court of equity would reform the deed and direct it to be made so as to give effect to the actual contract between the parties. Then the grantor had the estate for life, actual or potential, in the land, so that if he were not maintained by the plaintiff he could eject her and cultivate the land himself or let it; and if he had not such an estate he had the right of entry upon the land for breach of the condition upon which the conveyance was made, and that would determine the plaintiff's title.

If the grantor had an estate for life, and the plaintiff failed to perform the condition, the grantor being in possession of a life estate might, by an express declaration to the effect that he claimed to put an end to the plaintiff's reversion for such breach, have probably done so—*Digges's Case*, 1 Coke 157*a*, 173*a*, 173*b*,—because, he could not make an entry upon himself. But that was never done.

The principal reason why, I am of opinion, this was not a voluntary deed is that the plaintiff was bound by condition to pay \$100 to each of her four sisters upon the death of her father and mother.

I have seen no case which shews that such a deed can be called voluntary, or said to be fraudulent against a purchaser for value. But even if there had been no such provision as to the \$500, can it be said that a deed conveying land to one on condition of that one maintaining the grantor for life is void, or even voidable at law?

It may be improvident or otherwise obnoxious, so that

a Court of equity would interfere and enquire into the transaction, and grant relief if it were necessary, but the deed itself is not void nor voidable at the instance of a stranger, although he should be a purchaser for valuable consideration.

If such a deed could be avoided by the mere act of sale by the grantor to a third person for value, the greatest injustice might be done to the first grantee, for he might have maintained the grantor well in every respect for twenty years, and the grantor might have got the best of the bargain ; and if he could take away the land from the first grantee in such a case it would be a manifest act of injustice, and I should say a fraud.

Yet that is the nature of the defendant's argument ; although the facts of the case are nothing like the case I have supposed.

The deed, in any view, is not void or voidable at law. I admit it was, and may be now, perhaps, enquirable into in a Court of equity. No such equitable defence has been pleaded by the defendant ; and if it were, I think the necessary enquiry could not be made or relief given at law, for the purpose would be in effect to set aside that deed upon special equitable grounds that could be efficiently enquired into in a special proceeding taken for that purpose.

If relief were given in equity now, it seems to me it could only be upon the assumption that the parties themselves long ago virtually put an end to the deed ; but that is a fact which, upon the evidence, I think they did not do.

The defendant, who claims under the second deed, which was made to his father, knew, as his father did, all about the plaintiff's deed and title ; and the price paid on the second deed was \$1,300, in ten yearly instalments without interest, or \$130 a year for that time only, and not for the life of the grantor and his wife ; and the ten years, computing from the time he took possession, ran out about two years before the grantor's death, and about thirteen years before his wife's death, so that the second purchaser did

not give anything like as much as the plaintiff was to have given. He is not entitled, then, to much consideration.

I still think the verdict should stand for the plaintiff.

Rule absolute.

RE MACE AND THE CORPORATION OF THE COUNTY OF FRONTENAC.

Temperance Act of 1864—Omission to give due notice of polling—By-law quashed.

A county by-law under the Temperance Act of 1864, passed on the 27th of September, 1876, and voted on on the 6th of November following, was quashed, upon motion made on the 25th May, 1877, on the ground that in several of the municipalities notice of taking the poll was not given in time, and was not put up in four public places, as required by the statute; it appearing that but for these irregularities the result might have been different.

Where the corporation did not support the by-law, but the Warden wrote to the representative of a class interested in doing so to take such measures as they might think proper. Counsel instructed by them was heard to shew cause. *Semble*, that any of the electors might be heard to support such a by-law if the council should fail to appear.

MAY 25, 1877, *Bethune*, Q. C., obtained from Morrison, J., sitting for the Court, a rule on behalf of the applicant, William Mace, calling upon the corporation of the county of Frontenac to shew cause why their by-law No. 124, passed on the 27th of September, 1876, and voted on by the electors of the County on the 6th of November thereafter, and entitled "A by-law prohibiting the sale of intoxicating liquors and the issuing of licenses therefor in the county of Frontenac," should not be quashed for illegality, because

1. A copy of the by-law was not posted up, with a notice, signed by the county clerk, of the day and place at which the same would be voted upon, in at least four public places in each municipality in the county for four weeks next before the week in which the by-law was voted upon, nor for four weeks next before the day on which the by-

law was voted upon, whereby the electors of the county were prejudiced and deprived of an opportunity of voting upon the by-law; and that the time and place of voting upon the by-law was not duly published as by law required: 2. That a copy of the by-law and notice was not posted up in at least four public places within each municipality of the county before the day fixed for voting upon the by-law; and the requirements of the Temperance Act of 1864 were in other respects not complied with, whereby the electors of the county were prejudiced and prevented from voting.

The case shewed that the by-law was first read on the 15th of June, 1876, and that the second and third readings were postponed till September, and that the council at that session adjourned on the 30th of that month, and that the notices of publication, &c., were ready for distribution on the 5th of October.

There are seventeen municipalities in the county, independently of the city of Kingston. The notices of publication for the townships of Palmerston and Oso were delivered by the clerks of the county council to the messenger to mail on the 5th of October, and for the other municipalities on the 6th of October, and it was believed the notices were duly mailed.

The municipalities, it were said, in which the notices were not duly posted up were the townships of Kingston Hinchinbrooke, Loughborough, Storrington, Pittsburg, Bedford and Oso.

The county clerk said there was ample time, in his belief, to put up all the notices in time before the polling.

The notices were duly published in the "Daily News," "Daily Whig," "Weekly British Whig," and the "Weekly Chronicle and News," newspapers.

The mails for Palmerston and Oso go by way of Brockville and Perth. They are weekly mails, leaving on Saturday.

As to the township of Kingston, the facts appearing in the affidavits were, that Samuel Martin swore that he resided in Florida, in the north-west part of the township

of Kingston: that Florida was a public place, and he saw no copy of the by-law posted up there, nor notice of the time and place for voting, and he knew nothing of the by-law. If he had seen any such notice he would have voted against the by-law: and many others were also deprived of the opportunity of voting, and did not vote.

Nelson Walker said the same, so also did Stewart Walker.

L. S. Snook said that the clerk of the township of Kingston stated to him that he got the copies of by-law and notices to put up on or shortly after the 9th of October, and that he posted up three of them at the village of Cataraqui, and one at the toll-gate No. 1 on the Waterloo and Loughborough road, about one mile from the said village, and that these were the only ones he posted up in the township; and that Collinsby, Glenburnie, and Balynahinch, are public places in the said township, and are situate on different macadamized roads several miles distant from where the copies of by-law and notices attached were posted up: that there were in the township 819 qualified electors, and only 207 voted on the by-law, 165 for it, and 42 against it.

The clerk of the township of Kingston, Peter McKern, stated that he did not tell any one he posted up the notices after the 9th of October. He had no recollection when he posted them. He posted them up in public places in the township.

The poll was upon the 6th, 7th, and 8th of November.

As to Hinchinbrooke, Edward Upham said, that in March, 1877, Mr. Hamilton, the township clerk of Hinchinbrooke and Oso, informed him that the notices sent to him were not posted up by him: that some of them were left by him locked up in the township hall, and that he handed others to persons, and he could not say what was done with them. The affidavit of the township clerk was, that he posted up the notices on the 7th or 9th of October. He does not deny what Upham said he, the clerk, told Upham. If posted up on the 7th, that was in time.

As to Loughborough. The applicant, William Mace, resided in it. He was a merchant, and the owner of a hotel in the township, and made a general statement of want of due notice, and for the proper length of time in the different municipalities, founded only on information and belief; and he stated that the fact of a poll being then about to be taken was not generally known, and many did not vote upon it because they did not know of it, and if the requirements of the statute had been observed he believed the majority would have been against the by-law, and that many refrained from voting who had notice because they believed the voting would be of no effect as the Act had not been observed.

Joseph Nichols, the township clerk, said he posted up the notices on or shortly after the 9th of October, in four places in the township,—one at Upham's hotel in Sydenham, one at the Union hotel at Sydenham, one at Mace's store in Sydenham, and one at the Town Hall in Sydenham. Those were all the notices he posted, although there are three other public places in the township, and Sydenham is at the south-westerly limit of the township.

John Switzer said, that since the voting he had made enquiry, and from statements of many electors, and from his own knowledge, he believed that by reason of the by-law and notices not having been posted up, as directed by the 5th section of the Temperance Act of 1864, one-fifth of the electors were not aware of when or where they could vote on the by-law until after the passing thereof, and if the by-law and notices had been posted up in four public places in each municipality the by-law would not have been approved of or adopted.

William Upham, William Blackly, Edward Upham and John Cummings stated precisely the same matters and in the like language. James Kellar swore substantially to the like effect.

For the defendants, Joseph Nichols, the township clerk, also made an affidavit. He says he received the notices on or about the 9th of October, and he caused them to be

posted up in four public places in the municipality on the 10th of October: that the taking of a vote was widely known in the municipality, and a large majority of the electors were for some time before well aware of the vote that was to be taken.

There were 525 electors in Loughborough, and 229 voted—for the by-law 97, against 132.

As to Storrington, there was no specific statement with respect to the posting up of the notices in that township filed by the applicants.

The defendants filed the affidavit of Alexander Ritchie, the township clerk, who said he received the notices on the 7th of October, and he posted up three of them, and he caused a fourth to be posted up, in public places in the township, before ten of the clock in the forenoon of the 9th of October.

Storrington had 535 electors, and 183 voted on the by-law—144 for it, and 39 against it.

As to Pittsburgh, Charles Belwa, the township clerk, said, that on or shortly after the 9th of October he received by mail the copies of by-law. He posted up the same with the notices attached thereto,—one at Burns's Hotel at Barriefield, one at Campbell's grocery in Barriefield, one at the council office at Barriefield, and he sent one to Brewer's Mills. He was not sure as to the day he posted up the notices.

Barriefield is a village at the western limit of the township, and Brewer's Mills are at the north-easterly limit of the township, and both are public places on the same road. Pittsferry is also a public place in the township on another road running through the township, and is at the south-easterly part of the township. The village of Kingston Mills, situate on another road in the township, is also a public place. These were the only notices which were put up.

Samuel Reid said he was a resident and elector of the township. He never saw any copy of the by-law or notices, and he had no knowledge of their contents or where the vote was to be taken till long after the by-law

was voted upon and the poll closed. If due notice had been given he would have seen the same and would have voted against it, but by reason of the want of due notice he had been deprived of the opportunity of voting on the by-law, and he did not vote.

There was no affidavit for the defendants filed in respect of this township. There were 645 electors: 151 voted—86 for, and 65 against the by-law.

As to Bedford, William Porter, an elector, said he never saw any copy of by-law or notice referred to in the affidavit of the applicant, and he had no knowledge thereof till after the by-law was voted upon and the poll closed. If due notice had been given according to the Temperance Act he would have seen it, and would have voted against the by-law, but by reason of the want of due notice he was deprived of the opportunity of voting on the by-law, and he did not vote.

Jeremiah Page made the like affidavit as to the by-law and notices relating to Bedford, which John Switzer and some others had made with respect to the by-law and notices which related to the township of Loughborough, as above stated.

The defendants file no specific affidavit as to Bedford.

The township had 270 electors; 60 voted—17 for it, 43 against the by-law.

As to Oso, John Shibley stated, his place of residence in the township was called "The Sharbott Lake Hotel": that it was the most public place in the township: that apart from his place there were not four other public places in the township: that the by-law and notices referred to in this matter were not, or were copies or any copy thereof, posted up at his place, nor posted up in four public places in the municipality.

Dennis Long made an affidavit relating to the township, of the like kind as John Switzer and others had made with respect to Loughborough.

John Hamilton, the township clerk of Oso, said he put up two notices concerning the vote to be taken on the by-

law, one on the 12th of October and the other on the 13th in two conspicuous places in the township, and he caused two more such notices to be posted up in conspicuous places in the township on the said 13th of October.

There were 90 electors of the township: 23 voted on the by-law—16 for it, 7 against it.

Irregularities were charged to have taken place in other municipalities in the county of the like kind as those which have been specifically referred to, but they were stated in general terms, and it was averred there was great difficulty in ascertaining the facts upon the subject.

September 12, 1877, *W. R. Mulock* appeared to shew cause to the rule before Wilson, J., sitting for the full Court.

Bethune, Q. C., opposed his being heard for the defendants, because he had a communication from the Warden of the county desiring that no objection should be made to the motion on behalf of the council.

W. R. Mulock said he had a letter from the clerk of the county council, written at the request of the warden of the county, addressed to Dr. Dickson as the representative of the temperance party in Kingston and the county, saying the county council would not oppose the rule, and "leaving it to yourself and the supporters of the by-law to take such measures, at your own cost, as may be thought advisable. In the event of your shewing cause against the rule, every facility will be afforded you as to access to papers, &c., in this office."

WILSON, J., said he thought Mr. Mulock might appear in the name of the county council, but really on behalf of the persons whom the county clerk had informed they might shew cause to the rule, but at their own costs. If necessary, the county council might ask to be indemnified by such persons against the costs of this proceeding, but he did not think Mr. Mulock could be prevented from shewing cause formally for the county. But if he were to be so prevented he might still be heard by the Court on behalf of some one or

more of the electors of the county, as such person or persons would have the right, if the county council failed to appear, to be heard by the Court in defence of the by-law. It could not be that the county council by their mere will or silence could defeat a by-law of this nature passed by a popular vote, and which can be repealed only upon another reference to the people. So that in one way or the other Mr. Mulock was entitled to be heard, and he believed Mr. Mulock was right in claiming to be heard formally in the name of the county council.

W. R. Mulock then shewed cause. The rule is too general in its terms. It contains the enactment of the 27-28 Vic. ch. 18, sec. 5. In place of alleging that copies of the by-law and notices attached were not put up at four conspicuous places in each municipality in the county, it should have stated in what municipalities there had been a failure to observe the requirements of the Act, and how and to what extent that failure had happened, for the defendants would then have known the precise nature of the default they were to answer, while, owing to the generality of the rule the defendants must necessarily have been put to great and unnecessary trouble in their inquiries as to what was done as to the posting up of the by-law and notices in each one of the municipalities in the county, which would have been and could have been avoided if the rule had specified in particular the defaults of which the applicant really complained. [WILSON, J. The generality of the case may be a question of costs, but I cannot say it is wrong, for the applicant may be complaining of the non-observance of the statute in every municipality in the county. If so, and he fail in establishing all he has alleged, he may have to pay the defendants the unnecessary expenses he may have occasioned them.] The applicant has been guilty of delay in moving the rule. The voting was in the beginning of November, 1876. The rule was not moved till the 25th of May, 1877, nor until the time for the granting of licenses, if the by-law should be quashed, had gone by. No licenses

can be granted until next year. The by-law has been in operation for many months, and it should not be set aside, under the circumstances stated, for a mere irregularity when no substantial wrong has been done. It may be there are more than 5000 electors in the county, and that only 1627 have voted on the by-law, but that was not attributable to the alleged want of notice of the time and place of voting, but to the indifference with which the majority in every municipality regards a measure of this kind. A one-third vote is a large vote compared with the votes which were given in other places on a like subject, and there is no reason to believe that a larger vote could be polled for any new by-law for the like purpose submitted to the people. The majority in favour of the by-law was very large. There were 1028 voted for it and 599 against it, or 429 of a majority. There was a majority in 14 of the 17 municipalities of the county in support of the by-law. The applicant is relying therefore only on a strict application of the law against the validity of the by-law, and he is not entitled to have the law so applied as a strict right: *Har. Mun. Man.*, 3rd ed., p. 188.

Bethune, Q. C., supported the rule. As to the delay, the Municipal Act allowed to the party a year within which to move, and just half of that time had gone by when the rule was granted; and some reasonable time must be allowed to the party to get up his case. That case, from the number of municipalities to be visited, and the great expense and inconvenience to reach some of them, and the difficulty also then to get the proper information, was not unnecessarily delayed, and the application was made in due time even if the Court can limit the motion in any case to a shorter period than a year. The whole case then rests upon the alleged insufficiency of the notices and the effect to be given to so serious a violation of the statute. It is plain that in many of the municipalities there was the most direct proof of a failure to comply with the requisite preliminaries of the statute, and there is great reason to suppose that in many of the other municipalities there had

been the like neglect, although that neglect could not in every case be specifically discovered. The cases of *Re Coe and The Corporation of the Township of Pickering*, 24 U. C. R. 439, and *Re Miles The Corporation of the Township of Richmond*, 28 U. C. R. 333, are expressly in favour of the motion.

September 21, 1877. WILSON, J.—In *Coe and Pickering*, just referred to, the motion was of the like nature as the present one, to quash a prohibitory by-law under the Temperance Act of 1864. There the first publication of the by-law and notices attached was in a newspaper issued on the 12th of January. The last publication was on the 2nd of February. That publication specified that a poll would be taken on the by-law on the 7th of February. The objection chiefly relied on was, that the poll was held too soon.

The statute required that the notice should be published “for four consecutive weeks,” &c., and the notice is to specify “that on some day within the week next after such four weeks, at ten o’clock in the forenoon,” &c., the poll will be held.

In that case the four weeks began, as it was decided, on the day of the first publication, which was the 12th of January. The four weeks would expire on the 8th of February, and the poll should have been “on some day within the week *next after such four weeks*,” so that the poll should have been between the 9th and 15th of February, while it was held on the 7th of February, and plainly before the time when it could be properly held.

In *Re Miles and the Corporation of the Township of Richmond*, 28 U. C. R. 333, also referred to by Mr. Bethune, the defect of publication was, that on the 2nd of October the first publication in a newspaper was made, and that specified that a poll would be held at 2 p.m., and the other three publications, the first of which was the 9th, stated it would be held at 10 a.m.

The statute just referred to required that the poll should be held at 10 a.m.

The first publication was held therefore to be altogether unwarranted, and the poll held on the 4th of November, was held too soon, computing the proper first publication from the 9th of October.

There are some other cases on the subject of notice which must also be considered.

The first is *Re Lafferty v. The Municipal Council of Wentworth and Halton*, 8 U. C. R. 232. In that case the applicant swore that he had heard of no other notice than the one he saw about the 31st of December, and, "as far as he knew, the municipal council did not give one calendar month's notice of their intention to open or alter the road."

It was shewn for the defendants that three notices had been put up, but there was no evidence as to the other three of the six which were required.

The Court declined to set aside the by-law on the alleged insufficiency of the notice, upon the unsatisfactory evidence which the applicant had furnished of there having been a failure by the corporation in that respect.

12 Vic. ch. 81, sec. 155, which was the clause in question, enacted that it should not be lawful to make any by-law for altering, &c., any public highway until one calendar month's notice had been given by written or printed notices put up in the six most public places in the immediate neighbourhood of such highway.

Parker v. The Municipalities of the United Townships of Pittsburgh and Howe Island, 8 C. P. 517, was decided on the authority of the preceding case. In the latter case Draper, C. J., said, as to the want of notice, at p. 520, "The case of *Lafferty v. The Municipal Council of Wentworth*, is very like the present. The applicant does not positively negative any notices having been put up, and the municipality do not prove that six were put up. But they prove positively that some were put up, and others, it is believed, were. * * We are clearly warranted by the case referred to in saying that, under these circumstances, we could not quash the by-law for want of notice."

Re Baker and Kennedy and the Corporation of the

Township of Saltfleet, 31 U. C. R. 386, is to the same effect.

In the case in hand the notices in the township of Kingston were not posted earlier than on the 9th of October. If they were posted so soon, the four weeks would expire on the 5th of November. The day for opening the poll was the 6th of November, and was therefore in proper time for that municipality, if the publication were on the 9th of October, which is not disproved.

There is another objection made to the notices in that township, which is, that the notices were not posted "in at least four public places in the municipality."

Mr. Snook says the township clerk told him he had posted up three notices at the village of Cataraqui, and another at number one toll-gate, about a mile from Cataraqui, and that these were the only notices put up in the township.

Mr. Snook also says that Collinsby, Glenburnie, and Balynahinch are public places in the township, and are situate on different macadamized roads, several miles from where the copies of the by-law were put up.

In such a case it cannot be said that the notices were put up in at least four public places in the municipality.

Putting three of the four notices in one village in so large a township as Kingston, every lot of which is probably occupied, and in which there are 819 electors, and the fourth notice within a mile of the same village, while there are other villages in the township where they could more properly have been put up, is not a compliance with the statute.

The object of these different notices is that they shall be in different localities in order that the electors of the township may be generally informed of the purpose for which they are put up.

The township clerk does not contradict that statement of Mr. Snook, although he had the opportunity of doing it if he could have done it, while he does deny some other statement which Mr. Snook says the clerk made to him.

The township clerk has evaded the due performance of his duty, and it may be that he has helped to defeat the

very object which it was his place to help in carrying out. He must be responsible for a dereliction of duty in that respect.

The applicant says he believes if the notices had been posted up as they should have been the voters would have disapproved of the by-law, and Samuel Martin and Nelson Walker, electors, say they knew nothing of the by-law or the proposed voting upon it for want of notice.

As to Loughborough, the township clerk says he caused notices to be posted up in four public places in the municipality on the 10th day of October. That is one day short of the four weeks. The above is his statement in an affidavit made for the defendants.

In his affidavit made for the applicant he says that he posted up the notices by putting up one at Upham's hotel at Sydenham; one at the Union hotel, at Sydenham; one at Mace's store, at Sydenham; and one at the town hall, at Sydenham; and he concludes as follows: "Said Sydenham is a village and a public place in said township, at the south-westerly limits thereof. Those were the only copies of said by-law posted up in said township, though there are three other public places."

In this case there appears to have been the most wanton violation of duty on the part of Joseph Nichols, the township clerk. He must have known that putting up all four notices at different places in the same village "at the south-westerly limits" of the township, while there were "three other public places" in the township, was not a proper putting up of the notices "in at least *four public places in the municipality*."

It is no wonder then that many of the electors knew nothing of the by-law, or of the time and place of voting upon it.

As to Storrington, the notices being posted on the 9th of October were in time, and there is no complaint as to the places of posting.

As to Pittsburgh, the notices are not shewn to have been put up too late, they are said to have been received by the

township clerk on or shortly after the 9th of October, and to have been put up by him, but "he is not sure as to the day he posted up the notices."

In this township also the township clerk says he posted up one of the notices at Burns's hotel, Barriefield; one in Campbell's grocery, Barriefield; one in the council office Barriefield, and he sent one to be put up at Brewer's mills. Barriefield, being at the west limit of the township, and Brewer's mills at the north-east limit.

Here again are three notices in the same village, while Pittserry and Kingston are said to be villages and public places in the township, yet none but these four notices were put up.

As to Bedford, there is no specific affidavit as to not putting up the notices, and the defendants do not answer it. According to the cases cited it ought to be shewn affirmatively that notices were not properly put up to induce the Court to quash the by-law.

As to Oso, it is plain no notices were put up till one was put up on the 12th of October, and the other three on the 13th of that month.

The case then stands thus. In the township of Kingston three of the notices were posted up in the same village of Cataraqui, and the fourth at a toll-gate one mile from Cataraqui.

In Loughborough, the notices were not put up till the 10th of October, which was too late, and all four notices were put up in the one village of Sydenham.

In Pittsburgh, three of the notices were put up in the one village of Barriefield, and the fourth elsewhere.

In Oso, the notices were put up on the 12th and 13th of October, and therefore too late.

The question now is, what is the effect of these very great and serious irregularities?

The statute says these notices *shall* be given for the time and at the places mentioned, and the purpose and object of the notices, it is manifest, are to procure a full declaration of opinion by the electors whether or not they approve of

or adopt the by-law which is submitted to them to be voted upon.

The benefit of the enactment will be almost nullified if irregularities and evasions such as are disclosed are permitted to prevail in the instances established by the applicant, and there is reason to believe that there has been as much irregularity in some other of the municipalities if it were capable of proof.

I have been in doubt whether I should quash the by-law, notwithstanding such manifest defects and defaults, as the cases shew the Court has a discretion in such cases, and will exercise it by not avoiding the by-law if there has been great delay in moving to rescind, or if serious embarrassment and difficulty would be created by the rescission. I refer to *Re Michie and the Corporation of the City of Toronto*, 11 C. P. 379; *Grierson v. The Provisional Municipal Council of the County of Ontario*, 9 U. C. R. 623; *Hodgson v. The Municipal Council of York and Peel et al.*, 13 U. C. R. 268; *Re McKinnon and the Corporation of the Village of Caledonia*, 33 U. C. R. 502.

The applicant has delayed moving here from about the 8th of November till the 25th of May, and until after the time for issuing licenses for the year has gone by.

The whole county had settled down to the new state of things adopted and settled by the popular vote of November last, and it would be a serious revulsion and surprise to undo what has been done and acquiesced in for so long a time; and it would apparently answer no purpose to vacate the by-law when no license can now be issued in the county for the present year, and when the opponents to the by-law can, if they have the majority in their favour, as the applicant says they have, undo the by-law which has been passed, and place themselves in the like position as to obtaining licenses for the coming year which they would be in if I were now to give effect to their motion.

I think the by-law has not been fairly submitted to the people, and that full expression has not been given to the public sentiment of the county, and that it is a dangerous

exercise of power to make to leave this by-law in force against such serious objections.

But I feel as much difficulty in vacating everything, and in creating embarrassment, and in undoing a settled condition of things acquiesced in for so long a time by the whole county, when these difficulties could have been avoided by a motion against the by-law at an earlier day, and which might, I think, have been done if the parties opposed to the by-law had used due diligence in their mission.

I think, under all the circumstances, it is better, as I have a discretion in the matter, to refrain from setting this by-law aside, and to refer the parties to the full Court.

I confess my own inclination is to quash the by-law, because it cannot properly be taken as a by-law passed, in my opinion, by the voice of the county, and I have felt much disposed to act upon that opinion.

Rule discharged, without costs.

From this judgment Mace appealed, and the motion was re-heard in this term before the full Court, December 6, 1877.

Bethune, Q. C., for the appellant Mace.

J. K. Kerr, Q. C., contra. The arguments were similar to those before Wilson, J.

December 28, 1877. HARRISON, C. J.—The evils arising from the excessive use of intoxicating drinks are many and widespread.

An Act which has for its purpose the repression of these evils, has a good purpose.

This is the purpose of the Temperance Act of 1864, but the Act, notwithstanding the goodness of its purpose, is a most serious infringement on the natural liberty of the subject.

A by-law passed under or for enforcement of the Act may be followed by consequences the most serious, both to

property and person. It is therefore the duty of the Court, when its power is invoked to quash such a by-law, subject to the provisions contained in section 37 of the Act, to ascertain whether the by-law moved against has really been so passed as to be a valid by-law, and if not so passed to declare it invalid.

The by-law under the Act may be, either for a local municipality or for a county embracing within its territorial limits a number of local municipalities.

In either case there must be publication in a newspaper, and posting up of copies of the intended by-law for the required period prior to the voting. The publication in a newspaper must be in some newspaper published weekly or oftener within the municipality, or if no such newspaper, then in some newspaper published as near thereto as may be. If the municipality concerned be a local municipality, there must be posting up of copies of the by-law in at least four public places in the municipality. If a county, then in at least four public places in each municipality of the county.

The object of requiring publication, as well by posting in public places as in a newspaper, is, that the electors may be as widely and generally as possible informed of the intended voting, and be prepared to express their will as to the proposed by-law.

With this object in view, it is necessary that the four public places in each municipality should be such places as will be most likely to attract the attention of the greatest number of electors in the particular municipality.

The posting up of three out of the four notices in a well settled municipality in one village of the municipality, where the municipality is several miles square, and has other villages, is plainly not a compliance with the directions of the statute, either in letter or spirit.

The policy of the law is to prevent surprise on the people who are chiefly interested in the contemplated change of law, and anything which is deliberately done against that policy is not only unwarranted by the Act, but a most culpable proceeding.

The requirements that the publication shall be for four consecutive weeks, and that the polling shall take place in the week next thereafter, are designed to carry out the same policy in all its fulness.

It is clear that these requirements were more or less neglected in the townships of Kingston, Loughborough, Pittsburgh, and Oro. In two of these municipalities the notices were not up for a sufficient length of time, and in the remaining two the notices were not placed in at least four of the most public places of the municipality.

It is also clear that but for these irregularities the result of the voting might have been different. Therefore, whether the by-law is viewed in the light of *Re Coe and the Corporation of the Township of Pickering*, 24 U. C. R. 439, or of *Re Johnston and the Corporation of the County of Lambton*, 40 U. C. R. 297, it cannot be sustained.

Then why should it not be quashed? It is illegal. It has been moved against in proper time. All this is conceded. But it is argued that it ought not to be quashed, because its quashing would unsettle the new state of things created by the by-law. This argument, if admitted, would render it needless to quash any by-law, however oppressive, or prevent the amendment of any law, however vexatious. It was an argument to which, obviously, little effect was given when the by-law was supposed to have been carried, and is entitled to as little consideration now as then. Cases where, after the money authorized to be raised by a by-law has been expended, and the municipality has obtained the benefit of the expenditure, and the by-law itself has become *effete*, afford no analogy for the decision of this case.

Those who were opposed to the by-law, whether few or many, have been constrained to submit to its provisions under the belief that it was a valid by-law. Those who were in favour of it, whether few or many, have, under a similar belief, obtained the benefit of its provisions. But now, when it is apparent to all that the by-law was illegally carried, and so is an illegal by-law, it is time that the delu-

sion under which all have been acting should be removed, and the truth be revealed and acted upon for the future.

In my opinion the by-law must be quashed with costs, including the costs of the argument before Mr. Justice Wilson.

ARMOUR, J.—I agree in the conclusion arrived at in the judgment appealed from, and on the grounds and for the reasons therein stated, and I am of opinion that the objections to the proper publication of the by-law are not affected by section 37 of the Temperance Act of 1864.

The cases of *Re Coe and the Corporation of the Township of Pickering*, 24 U. C. R. 439, and *Re Miles and the Corporation of the Township of Richmond*, 28 U. C. R. 333, are binding upon us, and I entirely concur in the law as laid down in them. If it is thought that the provisions of sections four and five ought not to be imperative, the Legislature can easily be appealed to to amend them. As they stand at present it seems to me that they are imperative.

Apart from these provisions, section 16 appears to shew that "due publication" is an essential prerequisite to the passing of the by-law.

The question then arises, ought we, either on account of the delay in moving to quash the by-law, or on account of any inconvenience that may arise from its being quashed, or for any other reason exercise our discretion, and refrain from quashing it.

The learned Judge who gave the judgment appealed from was strongly inclined to quash it, but thought it better to refrain from doing so, and to refer the parties to the full Court.

I do not think that, having regard to section 241 of 36 Vic. ch. 48, O. there was any such delay as should prevent our quashing the by-law.

Immediately upon the quashing of this by-law the license commissioners may, under 37 Vic. ch. 32, sec. 9, O., as amended by 39 Vic. ch. 26, sec. 4, O., issue licenses within

the county, and I see no inconvenience that can arise, nor was any particular inconvenience suggested on the argument as likely to arise, from the quashing of it.

I do not see how this by-law can be enforced after we have pronounced it to have been illegally passed for the want of due publication, and the attempted enforcement of it might lead to most pernicious results, greatly outweighing any possible inconvenience that may arise from the quashing of it.

This by-law brings the Temperance Act of 1864 into force in the county of Frontenac, and must be viewed in the same way as a by-law containing the provisions of that Act.

These provisions are very stringent, some of them highly penal. Offenders against them are punishable by fine, and in default of payment by imprisonment. The right of *certiorari* is taken away, and the right of appeal is also taken away "when the conviction has been made by a stipendiary magistrate, recorder, judge of the sessions of the peace, sheriff, or police magistrate."

And I am of opinion that where any by-law, which provides a penalty for the breach of its provisions, is brought before the Court on a motion to quash it, and the Court is of opinion that it is either illegal on its face or has been illegally passed, it is their duty to quash it.

I think, therefore, that the by-law in question ought to be quashed with costs.

WILSON, J.—I rather concur with than dissent from the judgment just pronounced.

Rule absolute.

ERB ET AL. V. THE GREAT WESTERN RAILWAY COMPANY.

R. W. Co.—Fraudulent receipts issued by station agent—Liability of Co.

The agent of defendants at Chatham, a station on their line, having authority to grant bills of lading and shipping receipts for goods, issued such documents representing certain flour to have been shipped by or received from B. & Co., addressed to the plaintiffs at St. John, New Brunswick. Bills of Exchange drawn by B. & Co. on the plaintiffs, and annexed to these bills of lading and receipts, were discounted by a bank at Chatham for B. & Co., and forwarded to the plaintiffs, by whom they were retired. B. & Co. were a firm of millers at Chatham, of which the agent was a partner, and the bills of lading and receipts were fraudulently issued by such agent, no flour having been received by him.

Held, HARRISON, C. J., dissenting, that defendants were not liable to the plaintiffs, for the agent in giving receipts for goods never received was not acting within the scope of his authority and employment.

Per HARRISON, C. J.—The agent having been held out by defendants to the public as a general agent for the transaction of the particular class of business, in which the public were largely interested, and the plaintiffs having in good faith trusted to his representations made in the ordinary course of trade, and by instruments known to be negotiable, the defendants, who had so enabled him to act to the injury of others, must be responsible, either on the ground of estoppel, or for his deceit.

DECLARATION against the defendants as carriers, alleging non-delivery of good.

First count: For that defendants were carriers of goods for hire from Chatham, Ont., to St. John, N.B., and in consideration that T. Brown & Co. would deliver defendants 200 barre's of flour marked "Creek Mills," to be carried by defendants from Chatham to St. John, and there to be delivered to the plaintiffs or their assigns for certain freight, and reward to be paid by the plaintiffs or their assigns to the defendants in that behalf, the defendants by their bill of lading dated 1st August, 1876, promised T. Brown & Co. that the goods in the said bill of lading mentioned should be safely and securely carried by them, and delivered to the plaintiffs or their assigns at St. John (certain perils and casualties only excepted), and the said T. Brown & Co. delivered the said goods to the defendants, and defendants received the same for the purpose and on the terms aforesaid; and the said bill of lading was thereupon then, for valuable consideration, delivered to the

plaintiffs, as and being the consignees of the goods mentioned therein, and the plaintiffs then became and were at the commencement of this suit, and still are, the *bonâ fide* holders of the said bill of lading for valuable consideration, and entitled to the property in, and possession of, the said goods; and although the delivery of the said goods was not prevented by any of the perils, &c., and all conditions have been performed, &c., necessary to entitle plaintiffs as such consignees and holders of the bill of action as aforesaid, to maintain this action, yet the said goods were not, nor were any part of them ever delivered to the plaintiffs at St. John, according to their said contract, and the same have been lost to the plaintiffs.

The second count was for other 200 barrels of flour, under bill of lading dated 4th of August, 1876.

The third count was for other 200 barrels of flour, under bill of lading dated 8th of August, 1876.

The fourth count was for other 200 barrels of flour, under bill of lading dated 10th of August, 1876.

The fifth count was for other 200 barrels of flour, under bill of lading dated 15th of August, 1876.

The sixth count was for other 200 barrels of flour, under bill of lading dated 18th of August, 1876.

Pleas :

1. Did not promise.
2. Goods not delivered to the defendants.
3. Plaintiffs not *bonâ fide* holders of the bills of lading.
4. Goods delivered by defendants to plaintiffs.
5. Notice to the plaintiffs, at the time they received the bills of lading, that T. Brown & Co. had not delivered the flour to the defendants.
6. That the six bills of lading were obtained from the defendants wholly by fraud of T. Brown & Co., and of the plaintiffs and of others through whom the plaintiffs claim.

Issue.

The cause was tried at the last Winter Assizes for the county of York, before Wilson, J., without a jury.

The defendants, in June, 1876, made arrangements for

direct shipments of goods to the Maritime Provinces from several of their stations in Ontario, including Chatham, and issued a circular to that effect containing instructions to agents.

Carruthers, defendants' agent at Chatham, was authorized to grant bills of lading for shipments to be made between Bothwell and Windsor to the Maritime Provinces.

Agents at other stations than the special shipping stations named in the circular were to issue ordinary shipping receipts, giving numbers of cars, by what route, and the name of the line by which the property was to be shipped, and the through rate.

These receipts were, at the option of the parties, exchangeable for through bills of lading, on presentation and surrender of them to the agent of any one of the stations at which through bills of lading were given.

Bills of lading were issued by Carruthers for the flour mentioned in the first and second counts of the declaration.

They were in form as follows:—"Shipped in apparent good order by Brown & Co., the following property marked and numbered as per margin. (Contents of packages unknown, and weights subject to correction.)—

Through rate, 55 cents, gold, per Brl., at \$4.80 per £., \$110. Gross weight 40,000 lbs.	MARKS AND NUMBERS.	ARTICLES.
	Creek Mills.	200 Brls. Flour.

To be delivered in like good order and condition unto Erb & Bowman, St. John, N. B., or to their assigns, he or they paying freight in cash for the said goods as per margin, with primage and average ascertained under the following terms and conditions. (Then followed the terms and conditions.)

"In witness whereof the agent signing for the Great Western R. W. Co. &c., hath affirmed, &c., dated, &c.

For the Great Western R. W. Co.

(Signed) "WM. CARRUTHERS, Agent."

The flour mentioned in the remaining four counts was covered by four railway receipts, dated 8th, 10th, 15th, and 18th of August, all signed "Wm. Carruthers, agent, Great Western R. W. Co."

The receipts were in the following form :—" Received from T. Brown & Co. the undermentioned property in apparent good order, addressed to Erb & Bowman, St. John, N. B., to be sent by the said company, subject to their tariff and to the terms and conditions stated above, and on the other side, and agreed to by the shipping note delivered to the company at the time of the giving of this receipt therefor.

NO. OF PACKAGES AND SPECIES OF GOODS.	MARKS, &C.
200 Brls. Flour.	Creek Mills.

The bills of lading and shipping receipts were, although signed in the name of Carruthers, not actually signed by his own hand, but by others in the service of the company, acting under his express directions.

The evidence shewed that there was no flour delivered to the company, corresponding to the bills of lading and shipping receipts.

It appeared that Carruthers, the agent of the defendants at Chatham, was a partner in the firm of T. Brown & Co., who were millers at Chatham, and that Carruthers fraudulently issued the bills of lading and receipts for the purpose of obtaining advances upon them.

There was evidence that the defendants had some knowledge of Carruthers's connection with T. Brown & Co. early in 1876, but instead of dismissing him, dismissed the person who made a complaint of some kind against him.

The bills of lading and shipping receipts, with bills of exchange annexed, drawn by T. Brown & Co. on the plaintiffs, were taken by T. Brown & Co. to the agent of the Merchants' Bank at Chatham, were discounted by him, the proceeds deposited to the credit of T. Brown & Co., and the bills of exchange, with the bills of lading, &c., annexed, forwarded to the plaintiffs for acceptance.

The bills of exchange were retired by the plaintiffs, who were commission agents doing business in St. John, N.B., but they never received any flour to correspond with the bills of lading and the shipping receipts.

The demand of the plaintiffs against the defendants was made up as follows :

Principal of six drafts.....	\$5,175 00
Interest at 8 per cent.....	142 25
	18 39
Commission	189 00
	<hr/>
	\$5,524 64

The learned Judge found that the plaintiffs were wholly free from blame, that they had no notice, or knowledge, or reason to suspect that all was not right, and that the defendants were free from blame, excepting legal responsibility, unless it were that they might have had notice before August, 1876, that Carruthers was not a proper person to have in charge of their station at Chatham.

The learned Judge ruled that as the defendants were the carriers and gave the bills of lading, and from such acts being from necessity done through the means of others that they were liable under 33 Vic. ch. 19, O., and that they would have been liable before that statute.

He accordingly rendered a verdict for the plaintiffs for the amount of their demand, \$5,524,64.

During Hilary term last, February 15, 1877, *M. C., Cameron*, Q. C., obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside and a nonsuit or verdict for the defendants entered, pursuant to the Law Reform Act, the said verdict being contrary to law and evidence, the defendants not being liable to the plaintiffs on the facts proved in the evidence at the trial.

During Easter term last, May 29, 1877, *Bethune*, Q. C., *C. Durand* with him, shewed cause. Both the bills of lading and the shipping receipts are representations of goods received to be shipped or shipped by the defendants: *British Columbia &c., Saw Mill Co., Limited*, v. *Nettleship*, L. R. 3 C. P. 499,502; *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, *Swift* v. *Jewsbury*, L. R., 9 Q. B. 301, intended to be transferred for the purpose of advances, and work an estoppel in favour of third parties, who may make the advances:

Holton v. Sanson, 11 C. P. 606; *Backus v. Schooner, Mar-engo*, 6 McLean 487; *Freeman v. Buckingham*, 18 How. 182; *Redfield on Railways*, vol. ii., sec. 187. This is independently of 33 Vic. ch. 19, O., and is not affected by the provisos to that statute: *Valieri v. Boyland*, L. R. 1 C. P. 182; *Jessel v. Bath*, L. R. 2 Ex. 267; *Brown et al. v. The Powell Duffryn Steam Coal Co.*, L. R. 10 C. P. 562. The defendants, who are a corporation, can only act through their agents, and are bound by the acts of their agents: *Royal Canadian Bank v. Grand Trunk R. W. Co.*, 23 C. P. 225.

M. C. Cameron, Q. C., and *Robinson* Q. C., contra. The defendants are not liable under 33 Vic. ch. 19, O.: *Grant v. Norway*, 10 C. B. 665, 688; *Coleman v. Riches*, 16 C. B. 104; and under the statute the person who signed the bill of lading only is liable: *Jessel v. Bath*, L. R. 2 Ex. 267. The bills of lading are not signed by the defendants, but by some person assuming to act for them, and were not in fact signed by their agent: *Swift v. Jewsbury*, L. R. 9 Q. B. 301. If the defendants come under the statute at all, they are relieved from liability, as against the plaintiffs, under the proviso of the statute: section 3. Six out of eight of the so-called bills of lading are not bills of lading under the statute, but simply receipts for goods.

November 19, 1877. WILSON, J.—This cause was tried before me, and I ruled in favour of the plaintiffs, upon the ground that the act of Carruthers must be considered to be the act of the company, as they could not act otherwise than by an agent, and that the act of the agent must be deemed to be their act.

The case has since been fully argued, and I have had the advantage of perusing the judgments of the Chief Justice of the Common Pleas, and of Mr. Justice Gwynne in a case of the like nature as this action against the same defendants, and upon the fraud of the same station agent, and also of perusing the judgment of the Chief Justice of this Court in this cause. Mr. Justice Galt agrees with Mr. Justice Gwynne that the defendants are not responsible for

the acts and fraud of Carruthers, their agent, in signing receipts, or in issuing way bills, or bills of lading, representing that so many barrels of flour had been received by him at his station on the defendants' line of railway, or that so many barrels of flour had been sent forward by him to the plaintiffs in this action, or to the plaintiff in the other action, when, in truth, Carruthers had not received or forwarded any such flour, while the two learned Chief Justices are of opinion the defendants are responsible for the acts of their agent.

It was a gross fraud, and part of a system of fraud which had been carried on for some time by Carruthers to the loss of the consignees of such fictitious flour and produce who had accepted drafts upon them for the value of such imaginary merchandize, believing they would receive actual value for the money which they became liable for and had to pay.

The fraud was committed as well against the defendants as against the plaintiffs, and the question is: Which of these parties is to bear the loss? It is needless to say that the real delinquent does not pay. If he were worth the amount he would not remain here. If he were not worth it he might remain here, but he would not be a profitable subject for suit in a civil action.

It has strongly been contended at different times that he who appoints one to an office, in which, and by means of which, he commits a fraud, upon another to that other's prejudice, should be answerable for the wrong done, because he put his appointee in a place where he could do such acts, and by means of which he has done them.

But the law has not proceeded so far.

It has long been settled that a master is liable for the careless and wilful acts of his servant done while he is performing the master's work, and is acting in the course of his service and employment. But that he is not liable if the servant is acting plainly on his own business, or to carry out his own personal objects, and not in his line of duty towards his master.

It is also settled that an agent who gives a receipt or a bill of lading for goods which he never got for his principal, or who gives a receipt or bill of lading for more goods than he truly received, or who issues a second bill of lading for the same goods he has already issued one for, does not by any such acts bind his principal, because the rule of law is, that the master, principal, or employer, is liable for his servant, agent, clerk, or otherwise in such matters and for such acts only which the latter performs in the course of his service and employment; and it is impossible it can be in the course of his duty and employment to give receipts or bills of lading acknowledging he has received goods for his principal which he has not got, and therefore he cannot bind his principal by such means, simply because he was not acting for his employer and could not by any pretext of agency so act for him when he had no pretext for usurping any such authority.

On consideration I am of opinion there is no distinction between the agent or other confidential employee of a company or corporation, and of a single person or private partnership.

And I am of opinion there is no difference between a general and a special agent in such cases—that is, there is no greater responsibility cast upon the principal when a general agent gives a fraudulent receipt for goods which he never got, than when a special agent gives it.

The only enquiry in any such case is, whether the agent, of whatever class he is, was acting in the course of the service and employment of the principal. If he were, the employer will be answerable. If he were not, he will not be answerable.

In this particular case I am obliged from the authorities, which shew there is no distinction between a corporation and a single person being the employer, as I had supposed there might be, to say that the receipts, or way bills or bills of lading given by Carruthers, the defendants' general station agent for the firm in question, which he never got, as he represented therein, were not and are not binding

upon the defendants, because they were given by him not as agent for the defendants, or in the course of his service and employment with them, but outside of it altogether.

The language so constantly used in the many cases to which I have referred, whether the agent was acting "in the course and service of his employment," may fairly raise, as they have raised, very considerable doubt whether the agent was not acting "within the course and service of his employment" in *Grant v. Norway*, 10 C. B. 665, 668, and in the other cases of the like kind, by giving a receipt for goods which were not delivered, when it was within his line of duty to *give receipts*, that is for goods which he did get.

It is not as if he had drawn a bill in his principal's name which was not within the scope of his duty in any form; but he had authority to give a receipt for goods, and if the employer is not liable when the receipt is given without the goods, it is equivalent to saying that the agent was not then acting in the course and service of his employment.

The members of a partnership are liable for the bills issued by one partner in the partnership name for his own private purposes, at the suit of an innocent holder.

A company is bound by the acts and publications of the directors, although the law was for long held otherwise: *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145.

A manager of a bank authorized to sign bills, &c., for the bank, and who makes such a bill for his own accommodation, binds the bank by it at the suit of an innocent holder for value: *Alexander v. McKenzie*, 6 C. B. 766; *Thompson v. Bell*, 10 Ex. 10.

These documents are transferable like bills, and innocent parties are exposed to the like hazards in taking them, which they would be exposed to in taking bills of exchange.

In this particular case the bank, which discounted the draft upon the plaintiffs, was also imposed upon, and if the plaintiffs had not accepted the bills, the bank would have been the losers in place of the plaintiffs.

In *Leather v. Simpson*, L. R. 11 Eq. 398, the bill of lading was a forgery, and the agent of the bank, who was quite ignorant of the forgery, wrote to the plaintiff that they had the bill of lading, on which the plaintiff accepted the bill, and it was held that the bank did not give a guarantee that the bill of lading was a genuine document.

Malins, V. C., at page 403 said: "This case is one which in a remarkable manner illustrates the perils of commercial life. It is one of perfect good faith on both sides; and the question is, which of two innocent parties is to suffer for the fraud which has been committed by issuing forged bills of lading?"

Every word of that is applicable here. It was impossible to guard against such a fraud as the defendants' agent committed here. He attempted to cheat them, and he attempted also to cheat the bank which discounted the draft upon the faith of the bills of lading, which he issued with all due formality in the defendants' name. And it happened unfortunately that he did cheat the plaintiffs, who accepted and paid the drafts under the like belief of the genuineness of the bills of lading.

The bank has fortunately got out of the trouble, the plaintiffs have been let into it in their place, and the defendants say they were never in any danger, and are not affected by anything that has happened, although their agent has alone done all the wrong.

The defendants may unquestionably be held liable for the fraud of their agent, committed by him in the course of his employment as such agent.

As in *Cornfoot v. Fowke*, 6 M. & W. 358, where Parke, B., says, p. 373: "It must be conceded, that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, *knowingly* commit a fraud in making it, not only is the contract void, but the principal is liable to an action." And the case itself, according to the opinion of the Lord Chief Baron, was an illustration of the rule that the principal cannot take the advantage of a bargain made by his agent which is founded on fraud, and that legal fraud is sufficient for the purpose.

There the agent, on being asked by the plaintiff if there was any objection to the house he was trying to let as agent for the defendant to the plaintiff, said there was not, when in fact there was a house of ill-fame next to it which had before prevented the defendant from letting it, and which subsequently prevented the plaintiff from occupying it with his family. And the Chief Baron held that, although the agent knew nothing of the house of ill-fame, and although the defendant, who nevertheless knew the fact, had given no directions to the agent one way or the other about it, yet the contract, being in fact founded on fraud, could not be enforced. And that opinion is the one which has had the sanction of the profession: *Wheelton v. Hardisty*, 8 E. & B. 232, per Lord Campbell, C. J., at p. 270; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, per Willes, J., p. 262. So also in *Wilson v. Fuller*, 3 Q. B. 1009, where it was said, if the agent had represented the house to be in the possession of a tenant at £100 a year rent and clear of rates and taxes, when it was not free from rates and taxes, such representation would have been a fraud which would have bound the principal the same as if it had been made by himself.

And in *Udell v. Atherton*, 7 H. & N. 172, where the agent falsely represented that a log of mahogany was sound, when he knew it was not sound, and the Chief Baron and Baron Wilde, whose opinions are thought to be the better opinions against the other two Barons, held that the principal was liable, although he did not know of the unsoundness, or of the agent's representations.

And as was said by Willes, J., in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, at p. 265: "But with respect to the question, whether a principal is liable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is liable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though

no express command or privity of the master be proved." And as in *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394.

But it is said that the principals are not liable when a receipt or bill of lading given by him for his principals for goods which he acknowledges to have received for them, but which he never got, although an innocent party, such as the plaintiffs are, have been imposed upon and injured by the acceptance of the transferable document which he falsely issued in the name of the defendants, because the giving of such a document when no goods were in truth received by him was an act which was not done in the course of his service and employment as agent for the defendants. And that is the law from the decided cases, as I understand them; and yet the agent had power to give such documents in the ordinary line of his duty which he delivered in this case as for goods actually delivered to him, and no one but himself could tell whether such goods were there or not, nor could he have discovered it even if he had made enquiry, for he would still have to take the same agent's word that the flour which was represented by the documents to be in store was the flour which was applicable to these particular documents, and the defendants were the persons who put the agent there, where, if he abused his power in the manner complained of in this action, they could not be liable, but if he did right they would be answerable, but in that case there would be no occasion to fear such a responsibility.

The line of demarcation is not quite satisfactory to me, which distinguishes between such acts which will make a principal answerable for the acts of his fraudulent agent and those which are not attended with that consequence, when a case such as the present gives no right or redress to these plaintiffs against the defendants.

But I think the law is clear, and by it I am bound to pronounce it to be in favour of the defendants, and to make the rule absolute for nonsuit.

MORRISON, J., concurred.

HARRISON, C. J.—I am unable to concur in making the rule absolute, and shall proceed to state my reasons for dissent.

I admit that if this action were brought by Brown & Co. against the defendants, recovery would be out of the question. See *Horsman v. Grand Trunk R. W. Co.*, 30 U. C. R. 130; 31 U. C. R. 535; *Carr v. London and North-Western R. W. Co.*, L. R. 10 C. P. 307. See further *Farmeloe et al. v. Bain et al.*, L. R. 1 C. P. D. 445.

But it appears to me that these plaintiffs are in a very different position. They are the holders of the bills of lading in good faith, and for value. They therefore stand in such a position that, if possible consistently with rules of law, they ought to be protected.

The argument for the plaintiffs is, that the defendants are, as against the plaintiffs, either estopped from denying the truth of the representations contained in the bills of lading, or are responsible in damages for the deceit of their agent in the apparent course of his employment.

This argument involves at least two considerations:—

1. Whether, if the bills of lading were actually signed by the defendants under their corporate seal, there would be an estoppel.

2. Whether, on the facts, it can be held that the bills of lading are signed by the defendants.

The case of *Holton v. Sanson*, 11 C. P. 606, is a direct authority in favour of the plaintiffs on the first question. To this may be added *McLean v. The Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 448; 24 U. C. R. 270.

Reference may also be made to the well known cases of *Freeman v. Cook*, 2 Ex. 654; *Cornish v. Abingdon*, 4 H. & N. 549, and to the subsequent cases of *Clarke v. Dickson*, 6 C. B. N. S. 453; *VanHasselt et al. v. Sack et al.*, 13 Moore P. C. 185; *Cave v. Mills*, 7 H. & N. 913; *Barry v. Croskey*, 2 Johns. & H. 23; *Woodley et al. v. Coventry et al.*, 2 H. & C. 164; *Re Bahia and San Francisco R. W. Co. (Limited)*, and *Trittin et al.*, L. R. 3 Q. B. 584; *Regina v. Shropshire Union R. W. Co.*, L. R. 8 Q. B. 420.

The propositions established by the foregoing cases are well summarized by Brett, J., in *Carr v. London and North-Western R. W. Co.*, L. R. 10 C. P. 307, 316, as follows: "One such proposition is, that if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such state of things did not in fact exist. Another recognized proposition seems to be, that if a man, either in express terms or by conduct, make a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts. And another proposition is, that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented."

If there were no difficulty as to the signing of the bills of lading, it ought to be held that the plaintiffs have brought this case within the bounds of the first of these propositions.

The usage of trade, as to the transfer of bills of lading, is now well known to, and recognized by, the Courts. The usage as to the transfer of railway receipts for goods to be shipped, was not so fully established by the evidence in this case, no doubt, for the reason that it is also undoubted and well known: *McLean v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 270; *Royal Canadian Bank v. Great Western R. W. Co.*, 23 C. P. 225. But no question was raised on this point, either at the trial or on the argument before us.

The great point in controversy before us was, whether the bills of lading, signed as they were either by Carruthers or in his name by his directions, can be held to be the bills of lading of the defendants, so as to make the defendants responsible, either at common law or under 33 Vic. ch. 19, O., for the truth of the representations therein contained.

A large portion of the produce business of the country is carried on by means of bills of lading and shipping receipts such as those produced, and this is on the footing that entire credit is to be given to them as representing real and genuine transactions.

This of itself is, of course, no reason why estoppel should prevail if on clear principles of law it ought to be held that no estoppel exists; but in the decisions of mercantile questions the necessities and convenience of commerce are not to be overlooked. See per Byles, J., in *British Columbia, &c., Saw Mill Co. (Limited) v. Nettleship*, L. R. 3 C. P. 499, 502.

If a company or person be liable for the wrong of another, whether it be fraud or other wrong, it may, of course, be described in pleading as the wrong or fraud of the company or person who is sought to be made liable in the action: *Raphael v. Goodman*, 8 A. & E. 565.

Whether the defendants are in any form liable to the plaintiffs must depend on the ever expanding principles of agency applicable to commercial transactions in the ordinary affairs of life.

The old doctrine was, that the principal was only answerable for the actual authority conferred, but in modern times the principal is often held bound for the apparent, although not the actual authority of the agent, and even for the misconduct of the agent acting in the service or in the supposed service of his employers without the knowledge, and even against the directions of his employers. See *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Betts v. Neilson*, L. R. 3 Ch. 429; *Tebbutt v. Bristol and Exeter R. W. Co.*, L. R. 6 Q. B. 73; *Bayley v. Manchester, Sheffield and Lincolnshire R. W. Co.*, L. R. 7 C. P. 415; L. R. 8 C. P. 148; *The Philadelphia, Wilmington, and*

Baltimore R. W. Co. v. Tingley, 21 How. 202, 6 Am. Railway Cases, 493; *Tench v. The Great Western R. W. Co.*, 33 U. C. R. 8.

The question is, whether in this case the defendants are responsible for the misrepresentation of their agent, so that his misrepresentation can in law be deemed and taken as their misrepresentation.

In the decision of this question in the first place consider the character and scope of the agency. The agent was not simply an ordinary station agent at one of the many stations along the defendants' line of railway, but a general agent authorized to do a particular class of business. This was to grant bills of lading for produce, such bills, as the defendants well knew being instruments of commerce, transferable from hand to hand as representatives of value. He, for the purposes of this business, was held out by the defendants to the public as a person in whose honesty in the discharge of duty the public might place confidence.

Such an agent, in my opinion, is a very different agent to the mere captain of a ship or keeper of a warehouse, whose agency is held to be only special and limited, and for whose bills or receipts there is, according to the decisions, no responsibility, except upon proof of delivery of the goods covered by the bills or receipts. See *Grant v. Norway*, 10 C. B. 665, 688; *Hubbersty v. Ward*, 8 Ex. 330; *Coleman v. Riches*, 16 C. B. 104.

But on the part of the defendants the argument is broadly advanced, that at common law there can be no authority implied to an agent of any kind to misrepresent a fact, and that in such a case the person prejudiced has no remedy except against the agent.

An examination of the cases bearing on this point, although presenting some contradictions will, I think, satisfactorily shew a steady expansion of the liability of the principal for the false or even fraudulent conduct of his agent, while acting in his service in the supposed discharge of duty, to the prejudice of persons in good faith dealing with the agent in the course of his employment.

And it will be found that this is especially the case where it appears that the principal is a corporation who can act only through and by means of agents.

Lord Cranworth, in *Ranger v. Great Western R. W. Co.*, 5 H. L. 72, 86, said: "Strictly speaking a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation."

The first class of cases which I propose to examine is that where corporations have been held liable for misrepresentations of their directors, to the prejudice of persons becoming shareholders on the faith of statements made in a prospectus issued by directors of the company.

In *Dodgson's Case*, 3 DeG. & Sm. 85, Vice Chancellor Knight Bruce held that directors cannot be the agents of the body of the shareholders so as to charge the latter with commission of fraud. This was followed by Vice-Chancellor Parker in *Bernard's Case*, 5 DeG. & Sm. 282, 289, but is opposed to *Brockwell's Case*, 4 Drew. 205. The latter case was however overruled in *Mixer's Case*, 4 DeG. & J. 575.

The general doctrine of the liability of the company in some form for the fraudulent misrepresentation of directors was fully recognised by Lord Cranworth in *The National Exchange Co. of Glasgow v. Drew*, 2 Macq. 103. He there said, p. 124: "What is the consequence of the company receiving such a report * * and publishing it to the world? I confess that, in my opinion, from the nature of things, and from the exigencies of society, that must be taken, as between the company and third persons, to be a representation by the company. The company, as an abstract being, can represent or do nothing. It can only

act by its managers. When therefore the directors, in the discharge of their duty, fraudulently * * for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and when the persons to whom the representation is addressed act upon it on the belief that it is true, I cannot think that society can go on without treating that as a representation by the company."

This doctrine, to the extent here expressed, was fully recognized by Lord St. Leonards in the same case, and afterwards by Lord Westbury in *The New Brunswick and Canada R. W. Co. v. Conybeare*, 9 H. L. 711, 725.

In the latter case, Lord Cranworth, referring to *Ranger v. Great Western R. W. Co.*, 5 H. L. 72, 86, said, p. 738: "Upon the evidence as to these facts it appeared to me, weighing it fully and deliberately, that the case wholly failed to be made out, and that there had been no such fraud at all. I therefore had no necessity to advise your Lordships upon the general question of law, but I then did express my opinion, and which I confess I still entertain, that if an incorporated company, acting by an agent, induces a person to enter into a contract for the benefit of the company, that company can no more repudiate the fraudulent agent than an individual could repudiate him, and that consequently the company is bound by the representations of its agent." And at p. 740: "But the principle cannot be carried to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit, because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe that it would be the law of the land if the directors were the agents of some person, not a company. The fraud must be a fraud that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorized him to be guilty of."

The same learned Judge, in a subsequent case, said:

"An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of these agents to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrongdoers, by imputing to them the misconduct of those whom they have employed," &c.: *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145, 167.

It remains, however, to be seen whether the general doctrine is really subject to the limitations which Lord Cranworth latterly sought to impose upon it, and whether it may not be carried to "the wild length," as he was pleased to describe it, of making the company responsible in an action of deceit for the fraud of their agents in the apparent course of their service.

The first case in which a great struggle on the point took place, was *Udell v. Atherton*, 7 H. & N. 172. In that case two learned Judges were of opinion that a principal should be held liable for the false and fraudulent representation of his agent as to the quality and value of an article which the agent was selling, but two equally learned Judges were of a different opinion. So that the case, apart from some valuable expressions of opinion of distinguished Judges, decides nothing.

But in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, the Court of Exchequer unanimously held that a principal is liable to an action for a fraudulent misrepresentation of his agent acting in the course of his business. The manager of the defendants, an incorporated bank, made a false and fraudulent representation as to the position of a customer of that bank, on which the plaintiff acted to his prejudice. The judgment of the Court was delivered by that great and lamented lawyer Willes, J. He said, at p. 265, speaking of the fraud of a servant: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's bene-

fit, though no express command or privity of the master be proved."

After referring to a number of cases he said: "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place *to do that class of acts*, and he must be answerable for *the manner* in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

This case was followed by the Court of Queen's Bench, where there was a false and fraudulent representation made by the manager of a bank as to a customer in answer to an enquiry as to the credit of a person with whom the customer intended to do business: *Swift v. Winterbotham*, L. R. 8 Q. B. 244; and although afterwards reversed, mainly on another point, the decision is still of value on the general doctrine now under consideration: *Swift v. Jewsbury*, L. R. 9 Q. B. 301.

In reversing the decision Lord Coleridge, C. J., at p. 312, said: "This decision does not at all conflict with the case of *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, and cases of that description which have been brought before us, because I apprehend that there can be no doubt that a different set of principles altogether arises where an agent of a joint stock company, in conducting the business of the joint stock company, does something of which the joint stock company take advantage, and by which they profit, or by which they may profit, and it turns out that the act, which is so done by their agent, is a fraudulent act. Justice points out, and authority supports justice in maintaining, that where a corporation takes advantage of the fraud of their agent, they cannot afterwards repudiate the agency and say that the act which has been done by the agent is not an act for which they are liable. If Parliament should so enact, well and good, but Parliament not having so enacted, the Courts have held what seems to me, if I may venture to say so, exceeding

good sense as well as justice, and which in no manner conflicts with the judgment I am pronouncing to-day."

Notwithstanding the opinions to the contrary expressed in *Udell v. Atherton*, 7 H. & N. 172, it may now be taken as settled law that where a principal has received, or may receive, a benefit from the fraud of his agent while acting in his service, the principal is responsible for the fraud of the agent, and may, notwithstanding the expressions to the contrary of Lord Cranworth, in *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145 165, be held responsible for the same, even in an action for deceit.

In *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 413, Sir Montagu Smith said: "But some expressions of opinion used by Lord Chelmsford and Lord Cranworth to the effect that an action of deceit is not maintainable against a corporation in respect of the frauds of its agents, have been strongly relied on on behalf of the respondents. With all respect for everything falling from authority so high, their Lordships cannot regard these *dicta*, relating as they do to English forms of action, as necessary to the decision of *Addie v. The Western Bank of Scotland*," &c.

The question now is, whether the law should be so held in a case where the principal has not profited or cannot profit by the fraudulent acts of the agent, although performed in the *apparent* service of the master.

So far as the public, who trust the agent, are concerned, it is of no consequence whether the principal has or has not received a benefit by the act, and so far as the public can form any opinion on the point, it must be in this case that the principal is so benefited, for the bill of lading is accepted in the belief of its truth, and it shews freight payable to the principal.

It cannot be affirmed that there was any substantial benefit to the principal, either in *Swift v. Winterbotham*, L. R. 8 Q. B. 244, or in *McLean v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 270.

The foundation of the rule must be that persons in the

situation of these defendants impliedly contract with the public for the honesty and fidelity of such agents as Carruthers while acting in the apparent discharge of duty.

In *Smith's Mercantile law*, 9th ed. 120, it is said: "As far as the agent's authority extends he has a right, to bind the principal to third persons. Now his authority may, as we have seen, be either expressly given, or inferred from the acts of his supposed principal. When it is expressly given there can be no doubt as to its extent, except from the uncertainty of words employed in delegating it. When, however, it is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent as well as of its existence; and in solving all questions on this subject the general rule is, that the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment; for he who accredits another by employing him, must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the *seeming* course of that employment, and on the faith of that credit, whether the employer intended to authorize them or not, since, where one of two innocent persons must suffer by the fraud of a third, he who enabled the third person to commit the fraud should be the sufferer."

Story, whose text books are now appealed to as being almost of as much authority as actual decisions—See per Cleasby, B., in *Robinson v. Mollett*, L. R. 7 H. L. 802, 829; *Tighe v. Tighe*, L. R. 11 Ir. Eq. 207; and per Richards, C.J., in *Robertson v. Watson*, 27 C. P. 598,—says in his work on Agency, 7th Ed. sec. 452: "It is a general doctrine of law, that although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds; yet, he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal

did not authorize or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies—*respondeat superior*—and it is founded on public policy and convenience for in no other way could there be any safety to third persons in their dealings directly with the principal or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent, as competent, and fit to be trusted; and thereby in effect he warrants his fidelity and good conduct in all matters within the scope of the agency.”

It appears to me that the rule is put on its true ground by this distinguished Judge and great law writer when he puts it on the ground of public policy, the necessity for the protection of the third persons in their dealings either directly with the principal, or indirectly with him through the instrumentality of agents.

It also appears to me that this was the real ground of the decision of this Court, in *McLean v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 270.

To hold that the defendants in this case are not liable for the fraud of their agent appointed by them to do a *particular class of business*, in which the public, as they knew, would be largely interested, acting in the course of that very business and for their apparent benefit, is to lay down as law a proposition opposed alike to the exigencies of trade and the broad principles of justice. Although standing alone in this Court, I cannot subscribe to a doctrine which appears to me so subversive of all principles of right and wrong. With all due respect to the opinions of the majority of the Court, I am unable to force my mind to the conclusion that it is the law.

The defendants held out Carruthers as an agent for the issue of bills of lading to be used for the purposes of commerce. They, as it were, guaranteed his good faith and honesty in that business. They made him one of their general agents for the purposes of that business. He, while in their employment, and acting as their general

agent for that business, in their name issued bills of lading for flour which he had never received. These bills afterwards in due course came into the possession of the plaintiffs, who, believing them to be true, in good faith advanced their money on them. Why should the defendants not be liable? Because it is said Carruthers was their agent *only* to issue bills after the receipt of the flour. But why were the plaintiffs to doubt the honesty or good faith of their agent? If Carruthers was a rogue the defendants who appointed him and sustained him in office should, in my opinion, suffer the loss, and not the plaintiffs, who had no voice either in his appointment or removal.

In such a case I cannot help thinking the question is not so much whether the act done was one done by the agent within the scope of his authority, in the ordinary narrow sense of these words, but—

1. Whether the agent was held out by the principal to the public as a general agent for the transaction of a particular class of business, in the transaction of which not only the principal but the public were largely interested.

2. And whether such agent assumed to transact such business to the prejudice of one of the public who, in the ordinary course of trade, and according to the usages of trade had in good faith trusted to the representation of the agent made in the ordinary course of trade, and by instruments well known and recognized in trade as being negotiable.

If these two questions must be answered in the affirmative, it appears to me the convenience of commerce, the safety of the public, good sense and justice all demand that under such circumstances there must be legal responsibility on the part of those who place such a man in such a position of public trust.

The ground of liability is not that the principal has been benefited by the act of the agent, but that an innocent third person has been damaged by confiding in the agent, who was accredited by the principal as worthy of

trust in that particular business. See per Bowie, J., in *Tome v. The Parkersburg R. W. Co.*, 17 Am. 540, 550.

This is the *ratio decidendi* in several United States cases cited in the last mentioned case.

In *North River Bank v. Aymar*, 3 Hill 262, it is said: "Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation and the principal is estopped from denying its truth to his prejudice."

If it were held that the defendants are not estopped against the plaintiffs from denying the truth of the representations contained in the bills of lading, as much as if the bills of lading were signed by the defendants themselves—See *Holton v. Sanson*, 11 C. P. 606,—they are, in my opinion, responsible for the deceit of their agent held out by them as one of a class whose business it was, on behalf of defendants, to issue bills of lading for the purposes of commerce. See *McLean v. The Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 448, 24 U. C. R. 270.

No question was made before us as to the form at the pleadings. But if the plaintiffs desire they should, I think, have leave to add a count for deceit, such as appears in *Oliver v. Great Western R. W. Co.*, in the Court of Common Pleas, 28 C, P. 143.

It is essential to public welfare that where the acts of acknowledged agents are accompanied with all the *indicia* of genuineness, and issued for a valuable consideration, the principal should be (in some form) responsible, whether the *indicia* are true or not. Such liability would conduce to greater vigilance on the part of the principal, greater fidelity in the agent, and greater security to all dealing with them. Per Bowie, J., in *Tome v. Parkersburg R. W. Co.*, 17 Am. 557.

The effect of so holding would be not only fairly to meet the exigencies of commerce, as between the different provinces of the Dominion, but to make the defendants and other railway companies desirous of embarking in inter-provincial trade more careful in the selection of agents for the purposes of such trade, and more vigilant in looking after the agents when appointed.

In my opinion the rule *nisi* should be discharged (a).

Rule absolute.

MARSHALL V. JAMIESON.

Contract to deliver wheat f. o. b. the cars—Duty to provide cars—Contract by telegrams.

Plaintiff, through his agent at Seaforth, early in September offered defendant 94c a bushel for his wheat f.o.b. at Clinton, where defendant lived, a station on the same line of railway as Seaforth. This was not then accepted, and on the 9th of September defendant offered to take that price, but plaintiff did not then want the wheat. On the 11th of September plaintiff telegraphed defendant: "Will take your wheat at 94 cents, f. o. b. Answer." On the same day defendant answered, "Will accept your offer 94. Send directions about shipping." *Held*, that the words, "Send directions about shipping," did not qualify the previous unconditional acceptance, and that there was a complete contract.

Held, also, that under such a contract it was the duty of the buyer to provide the cars: that the defendant in this case not having done so within a reasonable time could not recover for the non-delivery of the wheat; and that there was no evidence of a usage or custom to the contrary, even if such usage could be received to vary the contract.

Seemle, that the explanation of the alleged usage was that the sellers, in providing cars at Clinton under such contracts, were acting as agents for the buyers.

THIS was an action for the recovery of damages for a breach of contract to deliver wheat.

The declaration alleged that the defendant agreed to sell and the plaintiff agreed to buy 2,400 bushels of wheat at and for the price of 94 cents per bushel, to be delivered on

* See further *Swire v. Francis*, 37 L. T. N. S. 554, reported as the delivery of judgment in this case.

board the cars at the the town of Clinton in the county of Huron. Then followed the usual averment of performance of conditions precedent by the plaintiff, and non-delivery by defendant.

Pleas:

1. Did not agree.

2. The agreement was made on the terms that the wheat should be delivered free on board the cars at the town of Clinton to be furnished by the plaintiff, averring that the plaintiff did not furnish the cars within a reasonable time.

3. Refusal by the plaintiff to accept, although defendant was ready and willing to perform the contract.

Issue.

The cause was tried at the last assizes for the county of Huron, before Galt, J., without a jury.

The defendant, who lived in Clinton, in the early part of September, 1876, told Pringle, the agent of the plaintiff, that he, defendant, had about 2,500 bushels of spring wheat for sale. Pringle offered 94 cents a bushel for it. This was not at the time accepted. It was agreed that Pringle, who lived in Seaforth, was to go home and telegraph the best he could do.

On 6th September Pringle telegraphed defendant as follows: "Cannot exceed ninety-four F. O. B. at Clinton."

There was no answer to this telegram, but on 9th September defendant telegraphed to Pringle—"If you want wheat now will take your offer. Answer." Pringle on the same day, declining then to take it, answered that he might want some the next week.

On 11th September Pringle telegraphed defendant—"Will take your wheat at ninety-four cents F. O. B. Answer."

Defendant on the same day, 11th September, telegraphed Pringle—"Will accept your offer ninety-four. *Send directions about shipping.*"

Next day, 12th September, Pringle wrote defendant to "Begin on Friday and load two cars, and two each day after, until lot shipped out."

This the defendant by letter on 14th September refused, saying, that "when I sell, I want to ship it altogether." He on 15th September telegraphed Pringle to the same effect.

On 16th September Pringle telegraphed defendant—"Ship as fast as you can get cars." But, on the same day, defendant answered by telegram—"Cannot ship you the wheat now at the price you offer." On same day Pringle telegraphed defendant—"I hold your acceptance of my offer at ninety-four. Must ship wheat."

Defendant, on 18th September, wrote Pringle—"When I accepted your offer you should have taken the wheat promptly. I did not agree to hold it for your benefit at my expense. Your not taking the wheat at once put me in for renewal of note, insurance, &c."

Pringle, by letter dated 19th September, reiterated that he held defendant's acceptance of his offer of ninety-four cents F. O. B., and meant to hold him to it.

Wheat, after 11th September, steadily advanced in price.

The defendant sold the wheat to another at ninety-five cents a bushel, getting only \$25 advance on it.

Plaintiff commenced this action on 23rd September 1876.

The principal contest at the trial was, whether it was the duty of the defendant or of the plaintiff to have supplied the cars under the contract, supposing it to have been a complete contract, which the defendant denied.

The learned Judge received evidence to shew that by the custom of Seaforth it was, under a contract for delivery "F. O. B.," the duty of the vendor to supply the cars. Defendant objected to this evidence, and submitted that the seller acted only as agent of the vendee, whose duty it was, under a contract to deliver "F. O. B.," to supply the cars.

There was evidence that in previous transactions between Pringle and defendant about wheat the defendant without objection supplied the cars.

The learned Judge found there was a concluded bargain for the sale by the defendant to the plaintiff of the wheat

in possession of the defendant on 11th September, 1876, which the learned Judge found to be 2,500 bushels. He also found it was the intention of the parties that the cars should be provided by the seller, that having been the previous course of dealing between the parties. He also found that defendant did not refuse to deliver the wheat because the plaintiff did not tender the purchase money. He assessed the damages at two cents a bushel on 2,500 bushels, making \$50, and entered a verdict for the plaintiff for that amount.

During Easter term last, May 30, 1877, *C. Robinson*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant, or a nonsuit, pursuant to the Law Reform Act, on the ground that no contract was proved on which the plaintiff under the evidence was entitled to recover; and that the verdict was contrary to law and evidence; and for the reception of improper evidence in admitting evidence as to the meaning and effect of the words "F. O. B." in the alleged contract.

During the same term, June 7, 1877, *F. Osler*, shewed cause. There was a complete contract between the parties: *Webb v. Sharman*, 34 U. C. R. 410. The duty of a vendee to supply the vessel under a contract to deliver 'F. O. B.' is confined to cases where the shipment is intended to be by sailing vessel, and not by railway cars: *Howland v. Brown*, 13 U. C. R. 199. If the rule applies as well to railway cars as sailing vessels it is controlled by the local custom or usage at Clinton and by the conduct of the parties. There was no obligation on the part of the plaintiff to pay till the shipment of the goods: *Coleman v. McDermott*, 1 E. & A. 445, 451; *Clark v. Rose*, 29 U. C. R. 302. The defendant attempted to rescind the contract before a reasonable time for its rescission had expired: *Foster v. DeLa Tour*, 2 E. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111; and, therefore, there should be no interference with the verdict.

C. Robinson, Q. C., contra. Until the parties came to an understanding as to the mode of shipment there was no completed contract: *Webb v. Sharman*, 34 U. C. R. 410; *Pollock on Contracts*, 21 *et seq.*; *Story on Contracts*, 5th ed., sec. 502; *Abbott*, N. Y. Dig. "Contracts," vol. ii. p. 37; *Clark v. Dales*, 20 Barb. 42; *Fenno v. Weston*, 31 Verm. 345; *Eliason v. Henshaw*, 4 Wheat. 225; *Kinghorne v. Montreal Telegraph Co.*, 18 U. C. R. 60; *Willing v. Currie*, 36 U. C. R. 46. If there was a complete contract it was for defendant to deliver on cars provided by the plaintiff, and this is not to be controlled by evidence, if any, of a local custom, or by prior dealings between the parties: *Wigglesworth v. Dallison*, 1 Smith L. C. 598, 627; *Cumming v. Shand*, 5 H. & N. 95; *Ford v. Yates*, 2 M. & G. 549; *Bourne v. Gatliff*, 11 Cl. & F. 45; *Taylor on Evidence*, 6th ed., s. 1080. Here there were conditions precedent on the part of the plaintiff not performed, and these were to provide the cars for shipment and to pay the purchase money: *Rawson v. Johnson*, 1 East 203; *Benjamin on Sales*, 2nd ed., 480.

November 19, 1877. HARRISON, C. J. Although the verdict in this cause is small in amount, the questions raised for our decision are of great importance.

The first is, whether on the correspondence there is a complete contract between the parties for the sale and delivery of the wheat.

It is now well settled that the whole terms of the contract, when in writing, need not be expressed in the same paper or document, but may be collected from several letters containing proposals and ultimate agreements between the parties. The last communication must be a distinct and positive assent to an equally clear proposal.

There is no dispute in any of the cases as to the law. The only difficulty in each case is, the application of the law to the facts. See *Leney et al. v. Taplin*, 21 L. T N. S., 204, 207.

The law is undoubted, that until there can be said to be

an agreement of minds as to the material terms of the contract there is no contract : See *Watts v. Ainsworth*, 1 H. & W. 83 ; *Henkel v. Pape*, L. R. 6 Ex. 7 ; *Baker et al. v. Lyman*, 38 U. C. R. 498.

It is now held that an offer is accepted by the mailing of a letter of acceptance : *Dunlop v. Higgins*, 1 H. L. 381 ; *In re Imperial Land Co. of Marseilles*, L. R. 7 Ch. 587 ; *Thorne v. Barwick*, 16 C. P. 369 ; *Harty v. Gooderham*, 31 U. C. R. 18 ; *Taylor v. The Merchants' Fire Ins. Co.*, 9 How. 390 ; *Wheat et al. v. Cross*, 1 Am. 28. The case of the *British and American Telegraph Co.*, v. *Colson*, L. R. 6 Ex. 108, to the contrary, is not law.

If the person who receives a letter containing the terms of a proposal write an answer reciting the terms and declaring his acceptance of them, he will not be allowed in any way to vary the effect of them without his distinctly calling the attention of the party who made the offer to the fact of his desire to do so : *Proprietors of English and Foreign Credit Co. Limited v. Arduin et al.*, L. R. 5 H. L. 64.

If a condition be plainly affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, and a new proposal equally ineffectual to complete the contract until assented to by the first proposer : *Benjamin on Sales*, 2nd. ed., 33.

Where defendant offered to purchase a house upon certain terms, "possession to be given on or before 25th July," an acceptance by plaintiff saying he would give possession on 1st August, instead of being an acceptance, is a rejection of the offer : *Routledge v. Grant*, 4 Bing. 653.

In this case Best. C. J., at p. 661, said : "Till both parties are agreed, either has a right to be off."

An agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial : *Chinnock v. The Marchioness of Ely*, 4 DeG. J. & Sm. 638.

Further examples will be found in *Jordan v. Norton*, 4 M. & W. 155; *Hutchison et al. v. Bowker et al.*, 5 M. & W. 535; *Duke et al. v. Andrews*, 2 Ex. 290; *Honeyman v. Marryatt*, 6 H. L. 112; *McIntosh v. Brill*, 20 C. P. 426; *Carter v. Bingham*, 32 U. C. R. 615; *Willing v. Currie*, 36 U. C. R. 46; *Fenno v. Weston* 31 Verm. 345; *Appleby v. Johnson*, L. R. 9 C. P. 158; *Stanley v. Dowdwell*, L. R. 10 C. P. 102.

The party making the proposal is considered as renewing his offer every moment until the time at which the answer ought to be sent: *Thorne v. Barwick*, 16 C. P. 369; *Boston and Maine Railroad v. Barlett*, 3 Cush. 224.

If at that time the offer be rejected, there must be a fresh offer from the person rejecting it, and an assent from the other party to his offer, before there can be said to be any complete contract: *Hyde v. Wrench*, 3 Beav. 334.

Where defendant, on 6th June, offered, in writing, to sell his farm for £1,000, but the plaintiff, instead of accepting, offered £950, which defendant, after consideration, on 27th June, refused to accept, it was held that an offer by plaintiff of £1,000, on 29th June, without proof of assent by defendant, did not amount to a contract: *Id.*

See further *Felthouse v. Bindley*, 11 C. B. N. S. 869.

Where plaintiff, on 5th September, 1865, wrote defendants, asking their price for a certain specified quantity of leather, the defendants, on 7th September, replied—"We are now selling our leather for 22 cents cash at the Tannery." Plaintiff on 13th September wrote—"In reply &c., I will take 400 sides No. 1 over weight, &c. I will send over Mr. P. to look out what will be most suitable to my trade." And on 15th September defendants telegraphed—"Wednesday next will be most convenient to attend Mr. P. at Tannery." It was held there was a complete contract: *Thorne v. Barwick*, 16 C. P. 369.

The offer of the wheat in this case was first made by defendant to Pringle, plaintiff's agent at Seaforth. It was a verbal offer. But there was no agreement as to the price.

On 6th September Pringle telegraphed—"Cannot exceed

ninety-four F. O. B. at Clinton." There was no answer till 9th September, when defendant telegraphed—"If you want wheat now will take your offer. Answer." Pringle replied, declining then to take the wheat. Here Pringle's offer "of ninety-four cents F. O. B. at Clinton" was at an end.

But, on 11th September, Pringle renewed the offer in this form: "Will take your wheat at ninety-four cents F. O. B. Answer," Defendant, on same day, answered—"Will accept your offer ninety-four. *Send directions about shipping.*" Next day Pringle wrote—"Begin on Friday, and load two cars, and two each day after until shipped out." But defendant, on 14th September, by letter, refused to follow these directions, saying: "When I sell, I want to ship it altogether." On 18th September Pringle telegraphed "Ship as fast as you can *get cars*"; but on same day defendant refused to ship.

The argument on the part of the defence is, that there was only a contract subject to an agreement as to the shipping, and that, as the parties failed to agree as to the shipping, there was no contract.

The argument on the part of the plaintiff is, that the telegrams of 11th September contain a clear offer followed by a clear and unqualified acceptance resulting in a contract to deliver in a reasonable time and under reasonable circumstances, and that the enquiry for directions as to the shipping constitutes no material part of the contract.

It is difficult to decide which of these contentions on the authorities is the correct one.

In *Webb et al. v. Sharman*, 34 U. C. R. 410, where I was counsel for the defendant, the acceptance of an offer for cheese was as follows: "I accept your offer. *When will you box?*" My brother Morrison was of opinion there was a complete contract, the words in italics being collateral to the contract, but my brother Wilson was of a different opinion, and thought the acceptance was not absolute.

In *Leney et al. v. Taplin*, 21 L. T. N. S. 204, under a somewhat similar contract, arising out of correspondence,

Kelly, C. B., and Bramwell, B., thought there was a complete contract, but Martin, B., and Cleasby, B., were of a different opinion.

In *Neill et al. v. Whitworth*, 18 C. B. N. S. 435, where, on a sale of cotton, the acceptance contained the words—“*The cotton to be taken from the Quay*, customary allowance of tare and draft; and the invoice to be dated from delivery of last bale,” it was held that there was a complete contract to deliver in a reasonable time and under reasonable circumstances, and that the words in italics were no part of the contract.

This decision was affirmed on appeal in L. R. 1 C. P. 684.

In *Port Canning Land Investment, Reclamation and Dock Co. v. Smith*, L. R. 5 P. C. 114, where A. held debentures of B., a municipal body, and had a right to exchange them for lots of equal value, to be selected by him from building lands belonging to B., the rent of which lots were to be set off against the interest on the debentures, A. notified B. that he had selected certain lots, and asked permission to retain the debentures for a time, setting the interest against the rent. B. accepted, and at the same time informed A. *that the selected lots exceeded the value of the debentures, and he must pay the difference*. It was held that the contract was complete, and that the words in italics did not amount to the introduction of a new term as to the negotiations.

In *Brisban v. Boyd*, 4 Paige 17, where the acceptance of an offer of cotton was followed *by a request to designate and mark the bales on joint account and to inform when shipped*, the request was held to be no material part of the contract, but merely expressive of a wish as to the marking of the cotton, &c.

In *Clark et al. v. Dales et al.*, 20 Barb. 42, the acceptance of an offer of a boat load of flour was followed by the words, *please say to us when we shall remit*, and it was held that these words in no manner qualified the acceptance, so that there was a contract.

I think the weight of authority is in favour of holding that the words, "*Send directions about shipping*," used after an unconditional acceptance in no manner qualify the acceptance, and therefore that on the 11th of September there was a complete contract between the parties for the delivery of the wheat within a reasonable time. See *Parsons on Contracts*, vol. i., 5th ed., 480.

This contract was for the delivery by the defendant to the plaintiff of the wheat at ninety-four cents "F.O.B."

Now what is the meaning and effect of the cabalistic letters F.O.B., which in this case have apparently been the cause of the misunderstanding between the parties?

In *Cowasjee v. Thompson*, 5 Moore P. C. 165, 173, it was said by Lord Brougham to have been proved beyond doubt "that when goods are sold in London 'free on board' the cost of shipping them falls on the seller *but the buyer is considered as the shipper*."

This was accepted by Crompton, J., in *Browne v. Hare*, 4 H. & N. 822, 825, as being a correct statement of the law.

In *George v. Glass*, 14 U. C. R. 514, 519, it was proved that the words "free on board" include not only shipment but all port and harbour charges, such as canal duties, wharfage, &c.

Where the goods, pursuant to the contract, have been placed free on board it is the duty of the defendant at once to pay for them, unless the contract provide to the contrary: *Green v. Sichel*, 7 C. B. N. S. 747. And the duty to pay does not arise till the goods have been actually placed free on board: *George v. Glass*, 14 U. C. R. 514, 519; *Clarke v. Rose*, 29 U. C. R. 302.

But the point in dispute between the parties in this case is, not as to the obligation of the plaintiff to pay before or at the time of shipment, but as to his obligation under the contract to provide the cars for the purpose of shipment.

In *Wilmot v. Wadsworth et al.*, 10 U. C. R. 594, the ship without dispute between the parties, was under a con-

tract to deliver F.O.B. provided by the vendee; and this was held in *Howland v. Brown*, 13 U. C. R. 199, to be the correct construction of such a contract.

So, in *Coleman v. McDermott*, 1 E. & A. 445, 450, Sir J. B. Robinson said: "There is seldom, I dare say, any misunderstanding between parties as to what is meant in such cases by the undertaking to deliver "free on board." All that the buyer cares about is too plainly expressed to admit of doubt. He is to have the flour on board at the price per barrel that has been named, without any addition on account of charges or expenses of any kind, and whether the seller puts it on board the vessel that is sent to receive it, or whether the buyer is left to do it at the expense of the seller, is so much the same thing that it is not likely to raise a question; but in strictness I take it the meaning and effect of the undertaking is the same as it would be if the seller engaged to deliver the flour into the buyer's warehouse free of charge."

The effect of these decisions is, that the buyer, where the contract is for delivery into a ship F. O. B., must provide the ship.

It is not necessary for me to say what my opinion would be, if the question were not in this Court concluded by authority.

Whether the conveyance intended for the commodity sold be a sailing vessel or a railway car, I must assume, in the absence of some decision to the contrary, that the duties of the respective parties, under the contract "to deliver F. O. B.," are identical.

The plaintiff's counsel has not referred us to any decided case shewing that a different rule is to be applied in the case of railways to the one which is applied in the case of sailing vessels.

But the plaintiff, conceding that the general rule is as maintained by the defendant, attempted to qualify it by evidence that in Clinton the usage or local custom under a contract F. O. B. is for the vendor to supply the cars.

We must be very careful not to allow rules of com-

merce of general application to be qualified by what some people are pleased to describe as local customs or usages. We must also see that whenever anything of the kind is attempted, the proof of the local custom or usage is established beyond doubt.

Mercantile usage is provable by the multiplication or congregation of a great number of particular instances, shewing a given course of business and a general understanding established respecting it: *Mackenzie v. Dunlop*, 3 Macq. 22.

But a mere habit of affixing a special meaning to words when used in a particular class of contracts does not amount to a custom or usage of trade: *Abbott v. Bates*, 43 L. J. C. P. 150. See also *Llado v. Morgan*, 23 C. P. 517 524, 525.

I am of opinion that there was not satisfactory evidence of such a local custom or usage as is alleged in this case on the part of the plaintiff. See *Merry v. Nickalls*, L. R. 7 Ch. 733; *Dent v. Nicholls*, 20 W. R. 218 C. P. Nov. 1874.

Besides, where the meaning of a writing is reasonably clear, it is not, in general, competent to contradict it by proof of what is called local custom or usage: *Ford v. Yates*, 2 M. & G. 549; *Cowie v. Apps*, 22 C. P. 589; *Wiglesworth v. Dallison*, Smith's L. C., vol. i., 7th ed., 627.

The late Mr. Justice Story, in *The Schooner "Reeside,"* 2 Sumn. 567, used language which has since been quoted by different writers on the law of evidence, including *Greenleaf on Evidence*, 12th ed., s. 292; *Taylor on Evidence*, 6th ed., 1080, and *Browne's Law of Usages and Customs*, p. 50.

I cannot do better than quote his language. His words were, 2 Sumn. p. 569, "I own myself no friend to the almost indiscriminate habit of late years, of setting up particular usages or customs in almost all kinds of business or trade to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and

customs, often unknown to particular parties, and always liable to great misunderstandings and misrepresentations and abuses, to outweigh the well known and well settled principles of law. And I rejoice to find that of late years, the Courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implications, and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied. But I apprehend that it never can be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori* not in order to contradict them."

These words of sound wisdom will receive an echo from all concerned in the administration of justice, whose chief desire ought to be to see that rules made for the general conduct of mankind are generally respected and generally carried out.

The explanation of what is called a local custom or usage in this case seems to me to be that suggested by Mr. Robinson, viz., the *sellers*, in providing cars for the transport of grain at Clinton, act simply as *agents for the purchasers* whose duty it is, under a contract to deliver F.O.B., to provide them.

So that when the plaintiff by his telegram of 16th September asked defendant to get cars for the shipment of the wheat he was seeking, at a very late stage of the correspondence, to impose on defendant a duty which, although generally accepted by sellers in Clinton, is no part of a seller's duty under a contract to deliver F.O.B.

The plaintiff is suing for non-performance of defendant's promise to deliver the wheat, and in his declaration necessarily avers the performance of all conditions precedent on his part. One of these conditions was, that the plaintiff should, within a reasonable time for delivery, have provided the cars necessary for the purpose. The defendant's second plea is rested on the non-performance by the plaintiff of this condition precedent. The plaintiff does not venture by replication of any kind to get rid of the effect of the plea, but contents himself with traversing it. On this traverse the defendant must succeed.

It is not necessary under these pleadings to consider whether defendant has by his conduct disentitled himself in any manner from availing himself of this defence. See *Green v. Sichel*, 7 C. B. N. S. 747; *Bourne v. Gatliff*, 11 Cl. & F. 45; *Cumming v. Shand*, 5 H. & N. 95; *Riley v. Spottiswood*, 23 C. P. 318; *Baker et al. v. Lyman*, 38 U. C. R. 498.

The rule will be absolute to enter a verdict for the defendant.

MORRISON, J., and WILSON, J., concurred.

Rule absolute.

HANNAH PLOWS V. MAUGHAN AND CREIGHTON.

Married woman—C. S. U. C. ch. 73—Right to crops.

A married woman, married before 1859, without any settlement, owned land about a mile from the farm on which she was living with her husband. The husband who managed this land sowed it with hay, the seed being his own, and the crop was afterwards cut at the expense of the wife, and taken to the husband's farm, where it was kept separate from his hay. *Held*, that the hay belonged to the wife, and was not seizible under an execution against the husband. *Lett v. Commercial Bank*, 24 U. C. R. 552; *Harrison v. Douglas*, 40 U. C. R. 410; and *Irwin v. Maughan*, 26 C. P. 455, distinguished.

TRESPASS and trover for a quantity of hay.

Pleas: not guilty, and not possessed.

Issue.

The cause was tried at the last Spring Assizes at Owen Sound, before Galt, J., without a jury.

The hay in question was grown on lot 34, in the 1st concession of Keppel. That land belonged to the plaintiff. She inherited it from her father, who in 1871 died without a will. The plaintiff had been married twenty-five years in May, 1876. She and her husband lived on a farm about a mile from the wife's land. She had money of her own, also derived from her father.

For several years before 1876 the husband had employed men to cut timber on the wife's land. It was not shewn what became of it. The first crop of hay was taken off the wife's land in 1875. It was taken to the husband's farm and placed with his hay. The hay which was taken off the wife's land in 1876 was the produce of sowing. The seed was from the husband's hay, who up to the time of sowing it managed the farm. The husband sowed it. There was no understanding that he was to be paid for his labour. He sowed the land without being told to do so by his wife. The hay was, however, cut at the expense of the wife. There were about thirty-five tons of it. It was taken to the husband's farm, but kept separate from the husband's hay.

This hay was seized by the defendant Creighton, a bailiff of the other defendant, sheriff Maughan, on an execution against the goods and chattels of the husband. There was evidence that the hay was worth \$10 a ton at the time of the seizure but it sold for less. The plaintiff forbade the sale.

There was evidence that the plaintiff's husband, but not in her presence, had spoken of the hay as his. This was objected to by the plaintiff.

The learned Judge found that lot 34, in the 1st concession of Keppel, was the property of the plaintiff, but that it was managed by William Plows, her husband, who it was admitted managed the farm up to the time of sowing the seed from which the hay in question was raised, and the learned Judge being of opinion that the case was governed by *Lett v. The Commercial Bank*, 24 U. C. R. 552, rendered a verdict for the defendants.

During Easter term, May 30, 1877, *J. Reeve* obtained a rule calling on the defendants to shew cause why the verdict should not be set aside, on the ground that it was contrary to law and evidence, and the weight of evidence, and on the ground of the improper admission of evidence as to a certain statement alleged to have been made by the husband of the plaintiff, he not being a party to the suit; or why the verdict should not be set aside, and a verdict entered for the plaintiff, in pursuance of the Administration of Justice Act.

During this term, November 27, 1877, *F. Osler* shewed cause. The hay was rightly found to be the property of the husband: *Lett v. The Commercial Bank*, 24 U. C. R. 552; *Harrison v. Douglass*, 40 U. C. R. 410. And as the evidence improperly received did not influence the finding, there should be no new trial for improper reception of evidence: Administration of Justice Act, 1874, sec. 34.

Reeve, contra. The case is to be governed by Consol. Stat. U. C., ch. 73, and as the ownership of the land is admitted, and the husband and wife were not living together on it, the crop should follow the ownership of the

land: *Lett v. Commercial Bank*, 24 U. C. R. 552; *Rodwell v. Phillips*, 9 M. & W. 501; *Waddington v. Bristow*, 2 B. & P. 452, 455; *Addison on Contracts*, 7th ed., 523; *Tomkinson v. Russell*, 9 Price 287; *Benjamin on Sales*, 2nd ed., 96. He also cited *Dingman v. Austin*, 33 U. C. R. 290, and *Irwin v. Maughan*, 26 C. P. 455.

December 28, 1877. HARRISON, C. J.—The plaintiff is the admitted owner of the land on which the hay grew. Being the owner of the land, if she were a *feme sole*, she would also be deemed the owner of the hay, whether considered as *fructus industrialis*, or as *fructus naturalis*. Her ownership might be defeated by shewing either that the land on which the hay grew was demised to another, or that before or after the hay was cut she sold it to another.

Then is the fact that the plaintiff, who is a married woman—married before the 4th of May, 1859, without any marriage contract or settlement—sufficient to make it our duty to hold that the hay is not her property, but that of her husband?

The case was argued before us under the Consol. Stat. U. C. ch. 73, and under no other statute.

The first section of the Act applies to women married after the 4th of May, 1859.

The second section declares “that every woman who on or before the 4th of May, 1859, married without any marriage contract or settlement, shall, and may from and after the 4th of May, 1859, notwithstanding her coverture, have, hold and enjoy all her real estate not then, that is, on the 4th of May, 1859, taken possession of by the husband, by himself or his tenants, and all her personal property not then reduced into the possession of the husband, whether belonging to her before or after marriage, or in any way acquired by her after marriage, free from his debts and obligations contracted after the 4th of May, 1859, and from his control or disposition in as full and ample a manner as if she were sole and unmarried.” But

nothing in the Act contained is to be construed "to protect the property of a married woman from seizure and sale on any execution against her husband for her torts," &c.: Sec. 3.

It is manifest that the intention of the Legislature was to protect the property, real and personal, of a married woman, not reduced into the possession of the husband, from liability to be seized or sold on an execution against the effects of the husband for his debts, and this notwithstanding the fact that there was no marriage settlement or contract: *Re Linden et ux. v. Buchanan*, 29 U. C. R. 1; *Corrie et al. v. Cleaver et al.*, 21 C. P. 186.

The Act is to be construed as creating a marriage settlement in the terms of the first and second sections in all cases to which those sections respectively apply, and such settlement is to be dealt with as one made by a proper conveyance to trustees before marriage for the use of the intended wife: Per Draper, C. J., in *Lett v. Commercial Bank*, 24 U. C. R. 552, 558.

There is no room to argue that the husband in this case, after the cutting of the hay in any manner reduced into his possession, or in any manner, before seizure, held it with the assent of the wife. But it was argued, upon the authority of *Lett v. Commercial Bank*, 24 U. C. R. 552, that the husband having sown the seed from which the hay was produced, the hay was his and not her property. In that case the husband and wife were together living on the land from which the crops were produced, and for all that appeared the husband was the tenant of the land under the wife's trustees. This being so, the crops were presumptively the crops of the husband, and not of the wife. Such was also the state of things in *Harrison v. Douglass*, 40 U. C. R. 410.

In this case the husband and wife were not at any time living on the wife's land. It could not therefore be presumed that there was any tenancy on his part of that land, either at the time of the sowing or reaping of the crop. Although he sowed the land she reaped the crop,

and the same was afterwards kept separate from his crops. We see nothing to rebut the presumption of the ownership of the crops arising from the admitted ownership of the land.

The case on the facts is also a very different one from *Irwin v. Maughan*, 26 C. P. 455. There not only was the land purchased by the husband as his own, but both husband and wife were living upon it, and he worked it as his own.

If the Act for the protection of the property of married women is to have operation in any case, it must be allowed to operate in this case.

The plaintiff is, in our opinion, entitled to recover, and the amount which she on the evidence is apparently entitled to recover is \$350. But if the defendant think this amount too large, there may be a new trial on payment of costs on or before the first day of next term by the defendant.

It is much to be desired that in cases tried by a Judge without a jury the Judge, although against the plaintiff, should, as he has the advantage of seeing and hearing the witnesses, assess the damages wherever there is an important point of law involved, so that the Court, if differing from him in opinion, may enter the verdict for the amount assessed, instead of ordering a new trial for the mere purpose of assessing the damages.

MORRISON, J., having been appointed a Judge of the Court of Appeal, took no part in the judgment.

WILSON, J., concurred.

Rule absolute to enter a verdict for \$350, unless defendant elect by the first day of Hilary Term, to take a new trial on payment of costs.

BARBER V. MAUGHAN.

Chattel Mortgage—Statement and affidavit on renewal.

Held, following *Walker v. Niles*, 18 Grant 210, and dissenting from *O'Halloran v. Sills*, 12 C. P. 465, that on the renewal of a chattel mortgage the statement and affidavit may, when they refer to each other and are meant to be read together, be so read; and that if together they contain the particulars required by the statute the renewal is sufficient.

In this case the statement was "statement shewing the amount still due on a chattel mortgage made by, &c., (mentioning the names of the parties, and date of registry); amount of mortgage \$685; one year's interest at 20 per cent. \$137; amount still due \$822," and subjoined was an affidavit by the mortgagee verifying a copy of the mortgage annexed, and stating, "the above statement shews truly and correctly the interest I still have in the said mortgage and the amount still due thereon. * * The said mortgage has not been and is not kept on foot for any fraudulent purpose." *Held*, sufficient.

TRESPASS, trover, and common money *indebitatus* counts.
Pleas: not guilty, goods not plaintiff's, and never indebted.
Issue.

The cause was tried at the last Fall Assizes at Owen Sound, before Patterson, J., without a jury.

The question in controversy between the parties was as to the sufficiency of the renewal of a chattel mortgage under which the plaintiff claimed.

The mortgage was dated the 23rd of January, 1875, and was made by David McDowell, the execution debtor, in favour of the plaintiff, to secure payment of the sum of \$685, with interest at the rate of 20 per cent. per annum, in twelve months from date, and covered the stock of the execution debtor, situate on the north half of lot 5 in the 8th concession of the township of St. Vincent.

The defendant, as the sheriff of the county of Grey, seized and sold the stock at the suit of one Stubbs, who had recovered judgment and issued executions against the goods and chattels of the execution debtor.

There was no question about the good faith of the plaintiff's mortgage.

The statement filed with the renewal of the mortgage on the 22nd of January, 1876, was as follows:—

“Statement shewing the amount still due on a chattel mortgage made by David McDowell to James Barber, dated the 23rd of January, A.D. 1875, and registered in the registry office of the clerk of the County Court of the county of Grey.

Amount of mortgage\$685 00

One year's interest, at 20 per cent..... .. 137 00

Amount still due\$822 00

Subjoined, and apparently forming part thereof, was the following affidavit:—

ONTARIO, COUNTY OF GREY:

I, James Barber, of the township of Derby, in the county of Grey, yeoman, in the annexed copy of chattel mortgage named, make oath and say:

1. That hereto annexed is a true copy of the mortgage above referred to.

2. The above statement shews truly and correctly the interest I still have in the said mortgage, and the amount still due thereon.

3. Nothing has been paid on account of the said mortgage.

4. The said mortgage has not been, and is not, kept on foot for any fraudulent purpose.

Sworn, &c.

The plaintiff took possession of the goods under the mortgage, but this was after the issue of the execution, so the case turned entirely on the sufficiency of the renewal of the mortgage.

Counsel for the defendant contended the renewal was not sufficient, because the statement did not exhibit the interest of the mortgagee in the property, nor the amount still due thereon, and was not sufficiently verified by affidavit.

The cases cited in support of this contention were *O'Halloran v. Sills*, 12 C. P. 465; *Reynolds v. Williamson*, 25 C. P. 49, and *Walker v. Niles*, 18 Grant 210.

The learned Judge was inclined to hold, apart from authority, that the renewal was sufficient, but in deference to the authorities cited held it insufficient.

But in the event of the Court holding the plaintiff entitled to recover, he assessed the value of the property seized and sold by the defendant at \$371.

In the meantime he entered a verdict for the defendant.

During this term, November 21, 1877, *McMichael*, Q. C., obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff for the sum of \$371, or for such other sum as the Court might direct; or for a new trial, on the ground that the verdict was contrary to law and evidence, in this, that the evidence shewed a sufficient claim for the amount assessed by the learned Judge, and that the ruling of the learned Judge that the renewal was not sufficient was wrong.

During the same term, November 30, 1877, *C. Robinson*, Q. C., shewed cause. He relied upon the cases cited at the trial in support of the ruling of the learned Judge, and cited in addition *Saulter v. Carruthers*, 9 U. C. L. J. 158.

McMichael, Q. C., contra. The statement was sufficient within the decision of *O'Halloran v. Sills*, 12 C. P. 465, and if not it was clearly sufficient under the later decision of *Walker v. Niles*, 18 Grant 210.

December 28, 1877. HARRISON, C. J.—The question now before us has never, so far as we can learn, been before this Court for decision.

The tenth section of Consol. Stat. U. C., ch. 45, provides that "Every mortgage, or copy thereof, filed in pursuance of this Act, shall cease to be valid as against the creditors of the persons making the same, * * after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property claimed by virtue thereof, and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof, be again filed in the

office of the clerk of the said County Court, * * with an affidavit of the mortgagee or of his agent duly authorized in writing for that purpose, * * stating that such statements are true, and that the mortgage has not been kept on foot for any fraudulent purpose."

The affidavits required at the time of the original filing of the mortgage are made necessary for the purpose, as far as possible, of securing good faith as regards creditors, &c.

The object of section ten, as to renewal, is similar, and to carry it out provision is made for the giving of certain information, which must be verified under oath.

The information made necessary must be as to the following particulars:—

1. Interest of the mortgagee in the property claimed.
2. Amount still due for principal and interest.
3. Payments, if any, made on account thereof.

If we are at liberty to read the statement and affidavit together as mutually aiding each other, we think that the interest of the mortgagee is shewn, as well as the amount still due to the mortgagee under the mortgage.

If all the particulars made necessary by the statute were given in one paper, and that paper an affidavit, which set them all forth in detail, and declared that they are true, and that the mortgage is not kept on foot for any fraudulent purpose, there would perhaps be an omission to comply with the letter of the Act, but there would be full compliance with its spirit.

Even where there are two papers, there is nothing to prevent a reference being made from one to the other, so as in effect to make them one.

There is nothing more common than the extraction of a written contract, sufficient to satisfy the Statute of Frauds, from a number of letters which in some manner refer to each other, or are so connected that they may be read together.

The English Bills of Sale Act, 17 & 18 Vic. ch. 36, sec. 1, requires the filing of the bill of sale, or a true copy thereof, &c., "together with an affidavit of the time of such bill

of sale being made or given, and a description of the residence and occupation of the person making or giving the same," &c. And it has been held to be a sufficient compliance with this direction of the statute if the affidavit filed with the bill of sale refers to the residence and occupation of the attesting witness mentioned in the bill of sale: *Pickard v. Bretz*, 5 H. & N. 9; *Banbary v. White et al.*, 2 H. & C. 300; *Broderick et al. v. Scale*, L. R. 6 C. P. 98.

But in *O'Halloran v. Sills*, 12 C. P. 465, we find the late lamented and distinguished Judge, Draper, C. J., saying, at p. 468: "I do not think the statement contains what is required, and the mortgagee has no more right to transfer a part of what should be in the statement to the affidavit, than he would have to transfer to the statement the portion of the affidavit that the mortgage has not been kept on foot for any fraudulent purpose, and then make affidavit simply that the statements are true."

If *O'Halloran v. Sills* were the only case containing an expression of opinion on the point, we would be obliged to decide against the sufficiency of the renewal in this case, but that case has already been so commented on that it can no longer be implicitly followed.

The present Chief Justice of the Common Pleas, in *Saulter v. Carruthers*, 9 U. C. L. J. 158, while sitting in Chambers, and so bound by *O'Halloran v. Sills*, said he was not prepared to carry the law any further than in *O'Halloran v. Sills*.

Mowat, V. C., in *Walker v. Niles*, 18 Grant 210, refused to act on the opinion expressed in *O'Halloran v. Sills*, and gave expression to an opinion which is the reverse of it.

The learned Vice-Chancellor said, at p. 215: "The term statement is not a technical one; and any paper containing in any form the necessary information would be a statement. A sworn statement is as much a statement as if it were not sworn. I see no objection, under either statute, to the statement being in the form of an affidavit, for neither statute prescribes the form. What is material obviously is, that certain information should be given, and that that informa-

tion should be sworn to ; and considering that the Courts have found themselves constrained to sanction a departure from the strict letter of the statute in the decision already referred to, as to the filing of a true copy of the mortgage, * * I perceive no principle on which to hold that every particular that the statute requires must be in a paper distinct from the affidavit, and must be expressed in terms embodying all the information, without any reference to or assistance from the affidavit."

In *Reynolds v. Williamson*, 25 C. P. 49, 53, the present Chief Justice of the Common Pleas (without making any allusion to *Walker v. Niles*), treats *O'Halloran v. Sills* as an authority that the affidavit cannot be resorted to for the purpose of supplying defects in the statement. This is true, but it is equally true that *Walker v. Niles* is an authority to the contrary.

Thus we have an authority in one Court of co-ordinate jurisdiction to the effect that the affidavit cannot be resorted to for the purpose of supplying defects in what is called the statement, and an authority in another Court also of co-ordinate jurisdiction that the affidavit may be, and ought to be resorted to for such a purpose.

In this state of the authorities we think we are at liberty to express our own opinion, unembarrassed by the conflicting decisions which we have mentioned.

Our opinion is, that what is called the statement and what is called the affidavit may, when they refer to each other, and are meant to be read together, be so read, and that if so reading them the particulars made necessary by the statute appear, and the affidavit is in other respects in compliance with the statute, the renewal is sufficient.

The objections in this case are, that the statement is insufficient, because it does not exhibit the interest of the mortgagee, nor the amount still due.

The statement shews fully the amount still due on the mortgage, which mortgage is described as being made by David McDowell to James Barber ; but the contention is, that for all that appears in this paper, called the statement,

Barber may have assigned the mortgage, and at the time of making the declaration had no interest whatever in the mortgage.

No one, from reading the statement, imperfect as it is, standing by itself, ought to infer anything of the kind. But on reference to the affidavit, we find this paragraph, "The *above* statement shews truly and correctly the interest I *still* have in the said mortgage, and the amount due thereon."

It may still be said that the oath does no more than verify the statement, and that the statement fails to disclose the interest of the mortgagee, and for all that appears the person described in the mortgage as mortgagee is not shewn by the statement to be the holder when the statement was made.

But this would, we think, be a forced construction. It appears to us that the only fair meaning to be deduced from the reading of these two, read as one statement under oath, is, that Barber at the time of making the statement was still interested as mortgagee.

Language more technically appropriate might undoubtedly have been used, but in a case where the Legislature has provided no forms, it would be doing injustice to give to the language used any other than a fair, common sense interpretation.

Besides, it is not to be overlooked that the particular statements made are supported by the general allegation that the mortgage has not been kept on foot for any fraudulent purpose.

The essential statements, apart from the general allegation last mentioned, are—

1. The interest of the mortgagee.
2. The amount due thereon.

The statute requires that the affidavit vouch for these statements as "true." Now, the allegation in the affidavit is, that the statement shews "truly and correctly" the interest the mortgagee "still has," and the amount "still due."

The addition of the word "correctly" ought not, we think, under the circumstances, to be allowed to nullify the use of the word "truly." If the statement "truly states," it so far as the purposes of the Act are concerned "correctly states." The addition of the word "correctly" therefore is unnecessary, and can do no harm.

The averment required by the statute as to the truth is not, as in *Reynolds v. Williamson*, 25 C. P. 49, 53, to use the language of the Chief Justice of the Common Pleas, "diluted" into an averment of mere correctness.

WILSON, J., concurred.

MORRISON, J., having been appointed to the Court of Appeal, took no part in the judgment.

Rule absolute.

ULRICH V. THE NATIONAL INSURANCE COMPANY.

Insurance Cos.—Powers of Provincial Legislature—Statutory conditions—39 Vic. ch. 24, O.—Reference to arbitration.

Held, that the 39 Vic. ch. 24, O., was binding on an insurance company incorporated by the Dominion Parliament, as regarded an insurance effected by them in Ontario; and was not beyond the powers of the Provincial Legislature.

Where such a policy contained conditions differing altogether from those prescribed by that Act: *Held*, per HARRISON, C. J., that it must be treated either as containing no conditions, or the statutory conditions only. Per WILSON, J., that the statutory conditions not being printed on the policy, as directed by the Act, could not be deemed part of it as against the insured.

Per HARRISON, C. J.—No. 15 of the statutory conditions does not make the reference to arbitration a condition precedent to an action; and the provision in this policy for payment, "after the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy," if not nugatory as an attempt to vary the statutory condition, was not a reasonable condition.

Per HARRISON, C. J.—Under that condition the Judge at the trial might try the question of liability, and refer the amount to be ascertained in the manner there provided.

Remarks by WILSON, J., as to the further protection now required to be provided for the insurers.

ACTION on a policy of insurance.

The declaration alleged that the defendants by their policy of insurance, bearing date the 2nd day of December, 1876. duly executed, signed, attested, and countersigned in consideration of the sum of \$30, did insure the plaintiff against loss or damage by fire, in the sum of \$3,000, for the term of one year, as follows, \$2,860 upon his stock of hats, caps, collars, and shirts contained in a three story stone and brick building, covered with metal, and occupied as an hotel, a bottling agency, and by assured as a hat and cap store, situate and being No. 431, east side of Sussex street, Ottawa, Ont.; \$100 upon bed, bedding, and wearing apparel therein; \$40 upon awning and counter; and thereby agreed to make good unto the plaintiff all such immediate loss or damage not exceeding in amount the sum or sums insured as above specified, nor the interest of the plaintiff in the property, as should happen by fire to the property so specified, from the 2nd day of December, 1876, at 12 o'clock at noon, to the 2nd day of December, 1877, at 12 o'clock at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid in sixty days after the proofs of the same, required by the defendants, should have been made by the plaintiff, and received at the head office of the defendants, and the loss should have been ascertained and proved in accordance with the terms and provisions of the said policy, unless the property should be replaced, or the defendants give notice of their intention to rebuild or replace the damaged premises.

Then followed the usual averments of interest, loss by fire, proof of loss, and performance of conditions precedent.

Pleas: 1. Did not promise.

2. The plaintiff did not forthwith give notice of the alleged loss.

3. The plaintiff did not deliver a particular account of loss, and of the origin of the fire.

4. The plaintiff did not produce books, vouchers, and other evidence, although reasonably required so to do.

5. The plaintiff delivered a false and fraudulent account, stating his loss to be \$3,205.94.

6. Wilfully false and corrupt swearing as to the proofs.

7. Fire originated from a defective stove pipe, and the plaintiff's carelessness in respect thereto.

8. The defendants pray judgment of the writ and declaration herein, and that the same may be quashed, because they say that the said policy contained, and it contains, and was and is subject to other and further stipulations and conditions as follows, that is to say: "In case differences shall arise touching any loss or damage after proof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy," and "it is further hereby provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any Court of law or Chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided." And the defendants say that before this suit such differences did arise touching the plaintiff's alleged loss or damage, but the same has not been submitted to impartial arbitrators, nor was any award of arbitrators, fixing the amount of the plaintiff's claim under the said policy, by reason of the alleged loss or damage, made before the commencement of this suit, and this the defendants are ready to verify, therefore they pray judgment of the said writ and declaration, and that the same may be quashed, &c.

9. Fraud.

Replications : 1. Issue.

2. And for a second replication to the third, fourth, fifth, sixth, seventh, and eighth pleas, respectively, the plaintiff says that the said policy is a policy of fire insurance entered into and in force in the Province of Ontario after the 1st day of July, A.D. 1876, with respect to property in

the said Province of Ontario only, and not elsewhere, and that the conditions in the said third, fourth, fifth, sixth, seventh, and eighth pleas, respectively mentioned, are not, nor is any one of them, a condition mentioned or contained in the Fire Insurance Policy Act, 1876, or in conformity with any of the statutory conditions mentioned in or provided for in the said statute. And that to the said policy have not been added in conspicuous type, and in ink of a different colour, words to the effect mentioned in the first section of the said statute, and by the said statute required to be added to a policy of fire insurance entered into or in force in the said Province of Ontario, after the said 1st day of July, in the year last aforesaid, with respect to property in the said Province of Ontario, when it is desired to vary in any such policy the statutory conditions in the said statute mentioned, or to omit from any such policy any of the said statutory conditions, or to add to any such policy new conditions, or a new condition other than statutory conditions mentioned in the said statute, whereby said conditions in the said third, fourth, fifth, sixth, seventh, and eighth pleas, respectively mentioned, are and each of them is inoperative and void, and of no effect in law.

The defendants took issue on the plaintiff's second replication, and at the trial demurred to the same.

The following were alleged as the grounds of demurrer:

1. That the second replication is no answer to the pleas therein mentioned: that the policy in question in this cause is not subject to the objection taken by the said replication.

2. That the replication does not present the proper mode of answering the said pleas, and is not a proper reply thereto.

3. That the conditions of the said policy mentioned in the pleas are substantially in accordance with the said Act or statute mentioned in the said second replication, and with the conditions thereby provided.

The plaintiff joined in the demurrer to the second replication, and took exception to the seventh plea, but the exception was not argued.

The second replication to the eighth plea, the issue thereon, and the demurrer thereto, as well as the exceptions to the seventh plea, were added at the trial.

The trial took place at the last Ottawa Fall Assizes, before Ross, Co. J., acting for Burton, J.

The plaintiff from June, 1876, had a shop in Sussex street, in the city of Ottawa, in which he sold hats, caps, shirts, collars, Indian work, and goods of a similar description. He slept in a small room off the shop. In the shop was a stove and pipes leading directly into a brick flue in the shop. On the morning of Sunday, the 11th of February last, there was an alarm of fire at the shop. The fire was seen to break out through the front door. When the firemen reached the place the shop was so full of smoke and fire that little else could be seen. But so far as witnesses were able to see, they described the shop as being pretty full of goods. Most of the goods were either so destroyed or damaged as to be of little value. There was no proof as to the origin of the fire. Some supposed it originated from the fall of the stove pipe, which appeared to be down when first observed by some of the firemen. But it was admitted that this might have been done by the volume of water poured into the shop to extinguish the fire. The fire was first observed between nine and ten o'clock in the morning. There was not any person in the shop at the time. The plaintiff boarded in a house across the street, but was not in his boarding-house at the time. He was in a different, but not in a distant, part of the city.

The plaintiff forthwith notified the defendants of the fire, and on the 16th of February, 1877, made proof of his loss.

These proofs gave in detail the description and value of his stock from the time he commenced business on the 17th of June, 1876, and from this he deducted his sales from the commencement.

This statement included several job lots which the plaintiff bought for cash, and for which there were no

invoices, together with \$900 of work bought from Indians in October, November, and December, 1876, but not in fact covered by his policy, although supposed by the plaintiff to be so covered.

The aggregate of his stock was	\$3,729 94
The aggregate of his sales	700 00
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Loss on stock.....	\$3,029 94
Bed, bedding, and wearing apparel.....	126 00
Awning and counter.....	50 00
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	\$3,205 94

The defendants denied that his loss at all equalled the amount he claimed, and maintained that the claim was fraudulent.

The defendants also moved for a nonsuit, on the ground that the condition embodied in the policy, and referred to in the eighth plea, required the differences to be referred to impartial arbitrators to ascertain the amount of the loss, and a further clause in the policy declaring that no suit or action shall be brought against the company, for the recovery of any claim by virtue of the policy, shall be sustainable in any Court of law or Chancery until after an award shall have been obtained fixing the amount of such claim in the manner provided in the preceding clause.

The objection was overruled, and leave reserved to enter a nonsuit upon it.

The learned Judge, after hearing the whole of the testimony, submitted certain questions for the consideration of the jury, which, with their answers, are subjoined.

1. Did the plaintiff, from the time of commencing business on the 1st of June, 1876, to the time of the fire, buy goods to the amount of \$3,729.34? A. No.

2. Had the plaintiff in his store, at the time of the fire, goods to the value of \$3,029.94, exclusive of bed and bedding, wearing apparel, awning, and counters? A. No.

3. What was the amount of the loss and damage sustained by the plaintiff by the fire which happened on the 11th of February, 1877, on the following goods respectively?

(a) Hats, caps, collars, and shirts	\$1,700 00
(b) Bed, bedding, and wearing apparel	70 00
(c) Awning and counter	40 00
	<hr/>
	\$1,810 00

4. Did the plaintiff furnish or produce to the defendants certified copies (such as were practicable) of invoices of goods which he alleges he purchased, as required by the defendants? A. Yes.

5. Did the fire that destroyed or damaged the goods of the plaintiff, originate on account of the stove or stove-pipes being in bad condition or improperly secured or protected? A. No.

6. Did the plaintiff, at the time he furnished to the defendants the statement of his loss, know how the fire originated? A. No.

7. Was the statement or account of insured goods destroyed by the fire, and sworn to by the plaintiff, and rendered to the defendants, wilfully false? A. No.

8. Was the plaintiff guilty of carelessness and negligence in making a large fire in the stove, and leaving the same burning without leaving any person to look after and prevent accident by fire therefrom? A. No.

The learned Judge thereupon entered a verdict for the plaintiff on the issues to the first, second, and ninth pleas, and on the special replication (added at the trial) to the third, fourth, fifth, sixth, seventh, and eighth pleas, and contingent damages assessed at \$1,810. He entered the verdict for the defendants on the original issue to the eighth plea, but, through oversight, omitted to enter the verdict for the plaintiff on the original issues to the third, fourth, fifth, sixth, and seventh pleas.

During this term, November 23, 1877, *S. Richards*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict for the defendants on the issue joined on the eighth plea should not be set aside, and a verdict entered on said plea in favour of the plaintiff, on the ground that, on the facts appearing at the trial, the policy was not subject to the stipulations or conditions

relied on in the said plea, and the said plea in that respect was not proved; or why the judgment should not be entered in favour of the plaintiff, notwithstanding the finding on the said issue, on the ground that the said plea does not shew facts constituting a good defence to the action.

During the same term, November 21, 1877, *Ferguson*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a verdict for the defendants, or a nonsuit, entered instead thereof, or a new trial had between the parties, on the ground that the verdict was contrary to law and evidence, and the weight of evidence, and against the charge of the learned Judge who tried the cause.

During the same term, December 1, 1877, both rules were argued together.

The demurrer to the special replication to the eighth plea, and the sufficiency in law of the eighth plea, were argued at the same time.

The counsel treated the case as if the verdict were entered for the plaintiff on the original issues to the 3rd, 4th, 5th, 6th, and 7th pleas.

S. Richards, Q. C., for the plaintiff. The defendants, although incorporated by an Act of the Dominion Parliament, are controlled by 39 Vic. ch. 24, O. The conditions relied upon in the eighth plea are not standing conditions under that Act, and so are of no force or effect. The question is one affecting property and civil rights under sec. 92, sub-sec. 13, of the B. N. A. Act. All legislation affecting property and civil rights, except as to the classes of subjects specially mentioned in section 91 of that Act, appertains to the Provincial Legislature. No. 15 of the statutable conditions is the one which would be applicable, and it does not make the ascertainment of the claim a condition precedent to the right to sue: *Dawson v. Fitzgerald*, L. R. 1 Ex. D. 257, 260; *Horton v. Sayer*, 4 H. & N. 643; *Roper v. Lendon*, 1 E. & E. 825; *Tredwen v. Holman*, 1 H. & C. 72.

Ferguson, Q. C., contra. The contract in all its parts is one authorized by section 2 of 38 Vic. ch. 84, D., incorporating the defendants. The Dominion Legislature has power to incorporate all companies except those coming under the operation of sub-sec. 7 of sec. 92. Power to incorporate involves powers to contract as incident to the corporation. The whole power in this respect is with the Dominion Legislature, although to some extent affecting civil rights. If 39 Vic. ch. 24, O., conflict with section 2 of 38 Vic. ch. 84, D., the latter must prevail; but even if the condition under 39 Vic. ch. 24, O., be accepted as the one applicable, the ascertainment of the amount is as much under that condition a condition precedent to a cause of action as under the conditions set out in the plea: *Scott v. Avery*, 5 H. L. 811, 827; *Griggs v. Billington*, 27 U. C. R. 520; *Elliott v. The Royal Exchange Ass. Co.*, L. R. 2 Ex. 237. The verdict of the jury was against the weight of evidence on the issues to the fifth and sixth pleas.

December 28, 1877. HARRISON, C. J.—The defendants were on the 8th April, 1875, incorporated by the Dominion Act, 38 Vic. ch. 84.

The defendants are by the second section of that Act empowered “to make and effect contracts of insurance with any person or persons, firm, body, politic or corporate, against loss or damage by fire or lightning in any houses, dwellings, or stores, or other buildings whatsoever, and in like manner any goods, chattels, or personal estate whatsoever, for such time or times, and for such premiums or considerations, and under such modifications and instructions, and upon such conditions as may be bargained [and agreed upon, or set forth, by and between the company and the insured.”

Power is by the nineteenth section of the Act given to the company “to have offices, maintain agencies, and transact business in any part of the United Kingdom of Great Britain and Ireland, and in any part of the United States of America, should a majority of the shareholders at a special meeting, to be expressly convened for that purpose, so determine.”

It may therefore be inferred, although not so stated on the face of the Act, that the defendants were incorporated for *other* than provincial objects.

The defendants established an agency in the city of Ottawa within the Province of Ontario, and on 27th November, 1876, at that agency received an application from the plaintiff, who resides in the city of Ottawa, for an insurance on personal property, then being in the same city.

On the basis of this application the defendants, whose chief place of business is in the city of Montreal, issued a policy in favour of the plaintiff, but on the face of the policy it is declared that it is not to be valid "until dated and countersigned by Cluff, Sutton & Cluff, the agents of the company for insurance in the Ottawa district and its vicinity."

The policy was afterwards, on 2nd December, 1876, dated and countersigned at Ottawa by Cluff, Sutton & Cluff, and was by them delivered to the plaintiff, and is the policy sued upon.

By the policy the defendants agree to make good to the assured all such immediate loss or damage, not exceeding in amount, the sum or sums insured, &c., as shall happen by fire to the property, specified from 2nd December, 1876, to 2nd December, 1877, the amount of loss or damage to be estimated according to actual cash value, "and to be paid in sixty days after proofs, &c., are received at the office, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy."

Among these terms and provisions are the following:—

"In case differences shall arise, touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy," &c.

"It is furthermore hereby provided and mutually agreed that no suit or action against this company shall be sustain-

able in any Court of law or Chancery until after the award shall have been obtained, fixing the amount of such claim in the manner above provided," &c.

The defence set up in the eighth plea is rested on these terms and provisions.

The plaintiff submits that neither of these provisions is a condition mentioned in, or contained in, the Fire Insurance Policy Act of 1876 of the Province of Ontario, and contends that the provisions are, and each of them is, inoperative and void.

The defendants contend that having been incorporated under an Act of the Dominion Parliament, although transacting business in the Province of Ontario, they are not bound by the Act of the Provincial Legislature, and that even if so bound a corresponding condition in that Act in effect makes an adjustment of the amount of the claim by arbitration a condition precedent to action or suit.

We have therefore to decide—

1. Whether the 39 Vic. ch. 24, O., is binding on the defendants.

2. Whether, if binding on them, and supposing the statutable conditions to be for all purposes part of the policy, the adjustment of the claim by arbitration is a condition precedent to action or suit.

The Legislature of the Province of Ontario on the 21st of December, 1874, by 38 Vic. ch. 65, sec. 2, authorized a commission to be issued by the Lieutenant-Governor of the Province addressed to three or more persons holding judicial office in the Province for the purpose of determining "what conditions of a fire insurance policy are reasonable conditions."

The commissioners reported certain conditions, and the Provincial Legislature afterwards, on the 10th of February, 1876, adopted these conditions "as the statutory conditions to be contained in policies of fire insurance entered into or in force in this Province": 39 Vic. ch. 24, O.

This Act is intituled "An Act to secure *uniform* conditions in policies of fire insurance." It recites the commission already mentioned, its report, and the necessity for the

adoption by the Legislature of the conditions reported as statutory conditions.

The Act is not, it will be observed, restricted to policies entered into in the Province, but professes to control all fire policies in force in the Province.

It declares that the conditions set forth in the schedule to the Act shall, "*as against the insurers, be deemed to be a part of every policy of fire insurance hereafter entered into or renewed, or otherwise in force in Ontario with respect to any property therein.*" It also declares that "they shall be printed on every such policy, with the heading—Statutory conditions." It provides that if a company or other insurer desire "to vary the said conditions, or to omit any of them, or to add new conditions, "there shall be added, in conspicuous type, and in ink of a different colour," words to the following effect, "Variations in conditions. This policy is issued on the above statutory conditions, with the following variations and additions:— These variations (or as the case may be) are by virtue of the Ontario statute in that behalf, in force so far as, by the Court or Judge before whom the question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company."

Although the statute contains a direction that the statutory conditions shall be printed on every policy to which the statute applies, it does not in language make that printing essential to the operation of the statutory conditions which it enforces.

On the contrary, the declaration is that "*as against the insurers,*" meaning apparently whether the insurers print them on their policy or not, they shall "*be deemed to be part of every policy of fire insurance hereafter entered into,*" &c.

If printed on the policy they would, under ordinary circumstances, *be a part* of the policy, but whether printed or not by the insurers, they are to be "*deemed to be part.*"

It is not left in the power of the company, by neglect to print the conditions, to escape the legal obligation of the statutory conditions.

The words, "shall be deemed," mean shall "be supposed," or "shall be taken," that is to say, the statutory conditions shall in law, as against the insurers, be supposed or taken to be a part of the policy, whether in fact printed as a part or not.

The objection to such a construction is, that the insured may have a policy which does not contain the statutable conditions, and yet may be held bound by them. One answer to this objection may be, that the conditions are deemed to be part of the policy *only* "as against the insurers." And another, that even if deemed a part of the policy as against the insured, it is only requiring him to know the law and to apply it to his insurance.

It is unnecessary in this case actually to decide which of the two is the proper construction of the statute.

If Legislative example were necessary for the adoption of the latter construction, it will be found in 29 Vic. ch. 28, sec. 32, which declares that "every deed, will, or other document creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, *be deemed to contain* a clause in the words or to the effect following," &c. See also the Acts as to short forms of deeds, leases, and mortgages.

If insurance companies so far neglect the provisions of a Public Act of the Legislature as in no manner whatever to take notice of them, or any of them, in the policies which they issue, they must not complain if, *as against the insured*, the policies should be held to be policies issued without conditions of any kind.

The Act in no part of it declares that unless the statutable conditions be printed they shall not be binding on the company. But as to a variation, &c., from these conditions, it is declared that unless "the same is distinctly indicated and set forth in the manner or to the effect aforesaid, no such *variation, addition or omission* shall be legal or binding on the insured."

The meaning of this would appear to be that the insured, if he desire it, shall have the benefit of the statutory condi-

tions unaffected by variations, additions, or omissions, unless the latter are indicated and set forth as the statute directs.

For the purpose of making binding variations, additions, &c., it is necessary that the statutory conditions shall be printed, because the declaration is, that "this policy is issued on the *above* statutory conditions, *with the following variations and conditions.*"

Unless indicated as the statute directs, no question can be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, but "on the contrary, the policy shall, as *against the insurers*, be *subject* to the statutory conditions *only*": Section 2.

The meaning of the language used, taken in its ordinary and grammatical sense, is, that the policy issued after the passing of the Act shall in all cases be deemed against the insurers to contain the statutory conditions, subject only to variations, additions, or omissions, when indicated in the manner directed.

In no other manner is it possible, under the operation of this Act, to secure anything like uniformity in the conditions of policies of insurance.

If the Legislature had intended to make the printing of the statutory conditions in all cases essential to legal obligation, they would have imposed some pecuniary or other penalty on insurers for issuing policies without their being printed thereon. As it is, the penalty of having the policy taken as against them to be one without conditions, if the Court should so hold, will, we apprehend, be found a sufficient penalty.

We are bound to give to the words, "as against the insured," so often used in the Act, some meaning, and reading this Act as proposed, we give them a meaning which, I think, is not only consistent with the object or the purpose of the Act, but the only possible rational meaning.

If the defendants are bound by the provisions of 39 Vic. ch. 24, O., they have wholly disregarded its provisions,

and as against them we may look upon the policy either as containing no conditions or as containing the statutory and no other conditions.

Now the important question is, whether the Legislature of Ontario had power to pass an Act so general and so comprehensive in its terms as the 39 Vic. ch. 24, O.

For the powers of the Dominion and Provincial Legislatures we must refer to the fundamental law on the subject, the British North America Act.

The only *exclusive* powers expressly conferred by that Act on the Provincial Legislatures are those enumerated in section 92 of the Act.

One of these is "the incorporation of companies with provincial objects": Sub-sec. 11.

Another is "property and civil rights in the Province": Sub-sec. 13.

The last is "all matters of a merely local or 'private nature in the Province": sub-sec. 16.

Subject to these and other powers enumerated in section 92, it is in the power of the Legislature of the Dominion "to make laws for the peace, order, and good government of Canada."

No words used in reference to legislation could be more comprehensive than these words. Examples, however, are given of the exclusive legislative powers as to different classes of subjects intended to be vested in the Dominion Parliament. These, it is expressly declared, are not "to restrict the generality of the foregoing terms" of the section. And no matter coming within any of the classes of subjects enumerated in section 91, is to be "deemed to come within the class of matters of a local or private nature comprized in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It is not possible for each of two legislative bodies as between themselves *exclusively* to exercise the *same* powers. If the power be shewn to belong to one of the bodies this under such a section, excludes the other from the exercise of the power.

The difficulty is in a written constitution dealing with several independent political or legislative bodies by any form of language to enumerate all the details of power. Much must of necessity as occasion arises be left to be supplied by judicial interpretation.

The Supreme Court of New Brunswick apparently read section 92 of the Act as follows: "In each Province (*except as to the classes of subjects enumerated in the preceding section assigned exclusively to the Legislature of the Dominion,*) the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereafter enumerated, that is to say": *Robertson v. Steadman*, 3 Pugs. 621.

But with all due respect it appears that this reading is not a satisfactory one, because the classes of subjects enumerated in section 91 are only as mere *examples* of Dominion legislative powers, and it is expressly declared that the design is not thereby "to restrict the generality" of the preceding extensive power "to make laws for the peace, order, and good government of Canada."

The great distinction between sec. 91 and sec. 92 is, that while in the former the subjects enumerated are only designed as examples of exclusive legislative powers, in the latter the exclusive legislative powers appear to be all enumerated. See, per Lord Selborne, in *L'Union St. Jacques de Montreal v. Bélisle*, L. R. 6 P. C. 31, 35; and per Sir James W. Colville, in *Dow v. Black*, *Ib.* 272, 280.

There is, however, a class of powers of which no mention is made in the Act, but which are necessarily involved in the express powers conferred, and these are *incidental* powers.

Where the Imperial Legislature has conferred express legislative power to be exclusively exercised on any subject, either by the Dominion or Provincial Legislature, it must be intended that all powers, incidental or necessary to the complete exercise of that power by the proper legislative body, are also conferred.

If this were not so there would be a domain only covered

by crippled powers, which could not be efficiently exercised by either legislative body.

Regina v. Boardman, in this Court, 30 U. C. R. 553, although decided under the express language of the Act, affords what would otherwise be a good example of the existence of incidental powers, such as I have attempted to describe.

By the B. N. A. Act criminal law and criminal procedure are exclusively assigned to the Legislature of the Dominion, and yet it was held to be in the power of the Provincial Legislature to pass an Act which, if general, would be the exercise of a Dominion legislative power, but, as particularly applied to the subject of shop, saloon, or tavern licenses, was the exercise of a mere incidental provincial power.

The exclusive power "for the incorporation of companies with provincial objects" is by the B. N. A. Act conferred upon the Provincial Legislature: Sub-section 11 of section 92.

The exclusive power "for the incorporation of companies with *other* than provincial objects" is not in express language conferred on either legislative body, but impliedly remains with the Dominion Legislature.

It is not essential to the exercise of such a power by either Legislature that at the time of the creation of the corporation there should be details as to the *form* of the contracts which the created body may make. It is, speaking in general terms, enough for the purposes of the incorporation that there be a declaration of the object for which the corporation is created, that it have perpetual succession, and that it have power to contract, &c.

The power of an artificial body to contract, must, on well understood principles of law, as regards the *form* of the contract, like the power of a natural person to contract, be subject to the laws of the country, province, or place where the contract is made, and so reading the B. N. A. Act, there is no encroachment, whatever, in the case of insurance on the exclusive power of the Provincial Legislature to legislate as to "property and civil rights in the Province": Sub-section 13, section 92.

The most happy and appropriate descriptive definition of a corporation which I have seen is that of Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. 518, 636. He said: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.

* * * Among the most important are immortality (in the legal sense, that it may be capable of indefinite duration), and if the expression may be allowed, individuality ; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."

A corporation can exist only within the limits of the sovereignty which created it, but it may act elsewhere through agents, if the laws of other countries permit: *Bank of Augusta v. Earle*, 13 Peters 519.

The National Insurance Company, as a corporation, owes its being to the Legislature of the Dominion. That Legislature, when giving it being, not only gave it perpetual succession, but power to contract for insurance against loss or damage by fire, but the form of the contract, and the rights of the parties thereunder must, we think, depend upon the laws of the country or province in which the business is done.

In this respect the defendants are in no better or no worse position than a foreign corporation doing business in the Province of Ontario: *Howe Machine Co. v. Walker*, 35 U. C. R. 37.

It is much more convenient that all persons, whether natural or artificial, doing business in a particular country or province, should conform to the laws of the place where the business is done, than that such persons should be a law unto themselves, using privileges over others doing similar business in the same place, and this view, we think, is much more in harmony with the whole structure of the British North America Act than the contrary view.

This was the view expressed by Vice-Chancellor Proudfoot, in *Billington v. The Provincial Ins. Co.*, 24 Grant 299, 304, and by Mr. Justice Wilson, in *Dear v. The Western Assurance Co.*, 41 U. C. R. 553, 562.

Upon the whole we are of opinion that the defendants, notwithstanding their incorporation by the Legislature of the Dominion, are when doing business in this Province subject as regards such business to the provincial statute 39 Vic. ch. 24, and bound by its provisions.

This being the case, so far as the insured is concerned, the policy may be looked upon either as a policy without conditions of any kind or at most as a policy containing only the statutable conditions.

Assuming the latter as the view most favourable to the defendants, I am still of opinion that the plaintiff must recover.

The only statutable condition which resembles the conditions pleaded by the defendants, and the only one cited on their behalf in argument is as follows: 15. If any difference shall arise as to the value of the property insured, or the property saved, or the amount of the loss, such value and amount and the proportion thereof (if any) to be paid by the company shall, (whether the right to recover on this policy be disputed or not), be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree on the person then to two persons, one to be chosen by the party insured and the other by the company, and a third to be appointed by the persons so chosen, and such reference shall be subject to the provisions of the Common Law Procedure Act, and the award shall, if the company in other respects be liable, be conclusive as to the *amount* of the loss and proportion to be paid by the company.

The question is, whether this is a condition precedent to the right to sue or only something collateral providing for the ascertainment of the amount of the liability if either party choose to have that matter referred to arbitration.

It is not necessary for the purpose of deciding this question to refer to any of the reported cases before the well known case of *Scott v. Avery*, 5 H. L. 811.

That case, notwithstanding great differences of opinion among the Judges consulted by the House of Lords, establishes that it is competent for parties to a contract to stipulate that no breach shall occur till after a reference has been made to arbitration, in which event the arbitration is a condition precedent to the action, but short of that there is only a collateral covenant or promise which is no bar to the action.

Such was the understanding of that case, expressed with more or less clearness in *Roper v. Lendon*, 1 E. & E. 825; *Horton v. Sayer*, 4 H. & N. 643; *Braunstein v. The Accidental Death Insurance Co.*, 1 B. & S. 782; *Tredwen v. Holman*, 1 H. & C. 72; and *Elliott v. The Royal Exchange Assurance Co.*, L. R. 2 Ex. 237.

In none of the cases cited were there more valuable expressions of opinion than in the last one. In that case Kelly, C. B., at page 243, says: "The fair result of the authorities is, that if the contract is in such terms that a reference to a third person, or to a board of directors, is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference shall not oust the jurisdiction of the Courts, or deprive the party of his action."

Similar language will be found in the judgments of Martin, B., and Bramwell, B., but it is unnecessary to quote it.

The law is similarly expressed in the still later cases of

Griggs v. Billington, 27 U. C. R. 520; *Dawson et al. v. Fitzgerald*, L. R. 1 Ex. D. 257; *Edwards v. The Aberayron Mutual Ship Insurance Society (Limited)*, L. R. 1 Q. B. D. 563.

I am of opinion that the fifteenth statutable condition is collateral, and not a condition precedent to an action or suit.

But it was argued on the part of the defendants that this condition, instead of being read alone, should be read in connection with, and controlled by, the promise contained in the policy, which is, to pay after "the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy."

At present it strikes us that this is an attempt to add to, or vary, the statutable condition otherwise than in the manner indicated in the statute, and so is nugatory.

Besides, even if the condition were before us as proposed to be varied, I would not feel inclined to consider it as a just or reasonable condition, and for the following, among other reasons: The statutable condition, without variation, does not profess to deal with the question of liability, but only, as to *amount*, if there be an established liability. Now, why should the right to sue, and establish a liability, be postponed till the amount of the liability, if any, is ascertained? If the company admit the liability, and *only* dispute the amount, it would be reasonable that the latter should be decided by arbitration. But if they dispute the liability for any amount, and an enquiry arises which necessarily precedes the enquiry as to the exact amount, it would be unreasonable to hold that the first enquiry shall not take place till the second is decided. See *Mentz v. Armenia Fire Insurance Co.*, 21 Am. 80, 79, Penn. St. 478.

I think there would be nothing to prevent the Judge at the trial under such a condition trying the question of liability, and referring, if necessary, the amount of liability to be ascertained in the special manner provided by the condition.

Such a course of procedure would give to insurance

companies all the protection as against excessive valuation in the event of liability, as it is the design of the condition to afford them.

But as no such course was suggested at the trial of this cause, and no reference was at any time asked as to the amount, it is now too late to interfere with the verdict of the jury on that ground.

Besides we think the verdict on the merits ought not to be disturbed.

The defendants' rule will be discharged. The plaintiff's rule will be absolute to enter the verdict for the plaintiff on the original issue to the eighth plea. There will be judgment for the plaintiff on demurrer to the replication to that plea, and for the defendant on the exceptions to the seventh plea. The replication should be confined to the eighth plea, and the verdict entered for the plaintiff on the original issues to the third, fourth, fifth, sixth, and seventh pleas.

WILSON, J.—The 39 Vic. ch. 24, O., was passed for the purpose of settling by legislative declaration the conditions which should, in all cases, be considered "just and reasonable to be inserted in fire insurance policies in this Province."

The Act has not declared whether the statutory conditions set forth in the schedule to the Act shall, where no variation, &c., is made from them, be deemed to be part of the policy, although they are not set out in the body of the policy, or are not endorsed upon it.

The language is ambiguous. It is: "The conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereafter entered into or renewed, or otherwise in force in Ontario, with respect to any property therein, and shall be printed on every such policy with the heading, *Statutory conditions*."

I am of opinion, however, if none of the statutory conditions are in or upon the policy, it is not to be inferred that the parties must have agreed that every one of these conditions shall be deemed to be a part of the policy.

They differ in their nature, purpose and consequences.

The parties must expressly declare whether they have made all the conditions, or any or which of them part of their contract, and if nothing is said of them then none of them can be said to have been adopted.

There are expressions too in the Act which indicate that the statutory conditions, if they are to be binding, must be made expressly by the policy a part of it.

In the preamble it is said a commission was issued to certain commissioners to consider and report "what conditions are just and reasonable conditions *to be inserted in fire insurance policies* on real or personal property in this Province," and that the majority of the commissioners had settled and approved of the conditions set forth in the schedule of the Act, and that it was advisable the same should be expressly adopted by the Legislature "as the statutory conditions to be contained in policies of fire insurance entered into or in force in this Province."

Then section one declares that the statutory conditions "shall be printed on every such policy with the heading, *Statutory conditions.*"

And it is also enacted that if any variation, &c., is made in such conditions "there shall be added, in conspicuous type and in ink of different colour, words to the following effect :

"Variations in conditions. This policy is issued on the *above* statutory conditions, with the following variations and additions."

So that, considering the object of contracts, which is to specify the matters which are agreed upon, and which are to settle the rights and to govern the responsibilities of the contracting parties, and the difficulty there would be in saying whether the parties had adopted all of the statutory conditions, or any of them, and if any of them, which of them, and the different expressions in the statute just pointed out, I am of opinion that if the statutory conditions are not contained in or upon the policy, they are not to be deemed to be a part of it.

I am also of opinion that when the variations, &c., of the statutory conditions are not indicated as required by the statute, they are not binding upon the insured, and that all conditions, statutory or otherwise, in or upon the policy are by the statute binding on the insurers, but are not binding on the insured.

The Legislature intended to guard the insured against the insurer, and they have done it as well as it is possible to accomplish it by legislation.

Perhaps the size of the type in which the conditions and variations, &c., should be printed might have been provided for, because small "diamond" or "minion" is a solid objection to the reading, and a serious obstruction to the due comprehension of a subject so printed by almost every one who is interested in making it out.

The Legislature has now to guard the insurer against the insured, and in my opinion that can be done efficiently only by requiring all insurance actions and suits to be tried by a Judge alone. Uniformity of decision will be secured, and greater confidence will be felt in those contracts by such a provision.

MORRISON, J., was not present at the argument.

Judgment accordingly.

HAGARTY V. SQUIER.

Bill of exchange—Personal liability.

The defendant, the inspector of an insurance company, having arranged with the plaintiff as to the amount of the plaintiff's claim for a loss, gave the plaintiff the following bill:—

“\$875. To the Beaver and Toronto Fire Insurance Company.

“Toronto, November 6, 1876.

“Three months after date pay to the order of John Hagarty, at the Ontario Bank here, \$875, being payment in full of his claim under policy No. 71,514, for loss and damage by fire on the 27th of October last.

(Signed) A. SQUIER, *Inspector.*”

It was found as a fact that the plaintiff did not suppose that defendant would be, nor did defendant intend to make himself liable: that the actual bargain was, that the plaintiff should get a bill on which the company would be, but that there was no express agreement or understanding that defendant should not be, liable. *Held*, that defendant was personally liable.

THIS was an action by the payee against the drawer of of a bill of exchange, dated 7th December, 1876, payable at three months from date.

There was an equitable plea, to the effect that the defendant was and is the inspector of the Beaver and Toronto Mutual Fire Insurance Company: that as such inspector he inspected and enquired into a certain loss by fire which the plaintiff had sustained, and for which he claimed compensation from the company under a policy of insurance issued to him by the company, on the property so destroyed by fire: that having ascertained the amount due on the loss, he, defendant, with the full knowledge and consent of the plaintiff, who knew that defendant only acted as inspector of the company, drew in his, defendant's own name, upon the company for the amount due to the plaintiff on account of the loss, which is the bill of exchange sued on; and the defendant was not in any way interested in the bill of exchange, and never received any value or consideration for drawing the same, but acted only in his capacity as inspector for the company, and all this was well known to the plaintiff, and understood between the plaintiff and defendant at the time the bill was drawn, and

it was understood that the defendant should not be considered liable, but the plaintiff should look to the company alone as being liable on the bill.

Issue.

The issue was tried at Toronto, before Moss, J. A., at the Spring Assizes for 1877, without a jury.

The bill sued upon, which was on a printed form, was as follows:—

\$875. To the Beaver and Toronto Fire Insurance Company.

Toronto, November 6, 1876.

Three months after date pay to the order of John Harty, at the Ontario Bank here, eight hundred and seventy-five dollars, being payment in full of his claim under Policy No. 71,514, for loss and damage by fire on the 27th of October last,

(Signed) A. SQUIER,
Inspector.

The Company accepted the bill, but before it matured suspended.

Both plaintiff and defendant were examined as witnesses at the trial.

The finding of the learned Judge upon the evidence was as follows:—

“I find that the defendant was the Inspector of the Beaver Company: that as such inspector he settled this claim, which the plaintiff had against the company: that the plaintiff was desirous of obtaining cash instead of waiting three months: that the defendant informed him that it was the custom of the company to send a draft upon a settlement: that the defendant said that he would report the settlement and a draft might be sent: that not a word was then said about the defendant being a party to this draft: that the plaintiff had then no idea or expectation that Squier would be a party or would make himself liable: that the custom of the company was to send such drafts as this to their customers for their accommodation: that the defendant had no idea of making himself liable: that certainly not until the receipt of the draft, if then, had the plaintiff any idea that defendant would be liable to him. I find that there was no express understanding between

the plaintiff and the defendant that defendant should not be liable—that in fact nothing was said on that subject. I also find that at the time the bill was drawn there was no express agreement that the plaintiff should look to the company alone. Although I believe the plaintiff to be honest, I cannot unreservedly accept his statement that when he got the bill he thought he had secured the liability of the defendant. I think that even then what he believed was that he had the liability of the company. It is not probable that he knew that possibly by some rule of law the defendant, although he had added “inspector” to his name, would be liable. I find that the actual bargain between the plaintiff and defendant was, that a bill should be sent on which the company would be liable, and which the plaintiff might be able to get cashed. The case has been argued principally by reference to *Laing v. Taylor*, 20 C. P. That case seems to contain language which may support the defence, although I do not at this moment remember any case which goes so far as the present; and as the defence seems to be in accordance with justice I enter a verdict for the defendant; leaving the plaintiff to move to enter a verdict for \$884.

During Easter term last, May 25, 1877, *J. K. Kerr*, Q.C., obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff, for \$884, pursuant to leave reserved, and pursuant to the Law Reform Amendment Act.

During this term, November 23, 1877, *H. Murray* shewed cause. The plea was proved, and it is a good equitable answer, upon the authority of *Wake v. Harrop*, 6 H. & N. 768, affirmed, 1 H. & C. 202; *Laing v. Taylor*, 26 C. P. 416; *Druiff v. Lord Parker*, L. R. 5 Eq. 131; *Castrique v. Buttigieg*, 10 Moore, P. C. 94; *Denton v. Peters*, L. R. 5 Q. B. 475.

J. K. Kerr, Q. C., contra. The finding does not go far enough to sustain the defence, and notwithstanding the finding the plaintiff is enabled to recover. *Tucker Manufacturing Co. v. Fairbanks*, 98 Mass. 101; *Armour v. Gates*, 8 C. P. 548; *Dutton v. Marsh*, L. R. 6 Q. B. 361; *Ewart v. Weller*, 5 U. C. R. 610; *Hall v. Francis*, 4 C. P.

210; *Bank of Montreal v. DeLatre*, 5 U. C. R. 362; *Robertson v. Glass*, 20 C. P. 250; *Lyman v. Lovekin*, 20 C. P. 363.

December 28, 1877. HARRISON, C. J.—It is a popular notion that when a person draws a bill of exchange upon a company with which he is in some manner connected, and signs his name with a mere description of his office, he is not personally liable, but this notion is at variance with the law.

Often the person who signs does so without much consideration, and in the confident expectation that his company will be in funds at the maturity of the bill.

When this expectation is defeated by the insolvency of the company before the maturity of the bill, strenuous efforts are made to defeat an apparent personal liability on the part of the drawer.

If it were not for the equitable defence pleaded in this case, it is clear that there would be no ground whatever for resisting the plaintiff's right to recover. See *Ewart v. Weller*, 5 U. C. R. 610; *Bank of Montreal v. DeLatre*, 5 U. C. R. 362; *Laing v. Taylor*, 26 C. P. 416.

The reason for the decisions as to liability at law is, that the question, whether the party signing the bill is to be deemed the contracting party personally, depends upon the intention of the parties as manifested by the written contract itself, and not otherwise.

In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of his principal, though done by the hand of the agent. If he express this the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person, or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent

from personal liability. See per Gray, J., in the *Tucker Manufacturing Company v. Fairbanks et al.*, 98 Mass. 101, 104.

While the addition of the word agent, inspector, director, president, secretary, or treasurer, or other words of mere description, is not enough to rebut the *primâ facie* intention of personal liability expressed on the face of the instrument, the addition of such words as "for" or "on behalf of," or "on account of," the principal, naming the principal in the body of the instrument or in the signature, are sufficient to absolve the agent and charge the principal. See *Deslandes v. Gregory et al.*, 2 E. & E. 602; *Robertson v. Glass*, 20 C. P. 250; *Lyman v. Lovekin*, 20 C. P. 363; *Gadd v. Houghton*, L. R. 1 Ex. D. 357.

The addition of a corporate seal after the name and description of office is not *per se* sufficient to rebut the *primâ facie* liability imported by the language of the instrument. See *Foster v. Geddes*, 14 U. C. R. 239; *Corporation of the Township of Toronto v. McBride*, 29 U. C. R. 13; *Dutton v. Marsh*, L. R. 6 Q. B. 361. But see also *City Bank v. Cheney et al.*, 15 U. C. R. 400.

The address of the bill to the corporation does not shew that the drawers are the same as the corporation, but if anything, the contrary: *Tucker Manufacturing Co. v. Fairbanks, et al.*, 98 Mass. 101, 107.

The facts relied upon, as affording a good equitable answer, are, that defendant at the time of the signing and delivery of the bill was inspector for the Beaver Mutual Insurance Company: that before then he had ascertained the claim of the plaintiff against the company in respect of a loss by fire insured against: that under the policy the same was not payable for three months thereafter; and that to accommodate the plaintiff, and enable him to raise the money before the expiration of that period, and for no other purpose or consideration, the bill was given; and that when given it was understood between the parties that defendant was not to be held personally liable thereon.

The case chiefly relied on in support of the defence is *Wake v. Harrop*, 6 H. & N. 768, 1 H. & C. 202.

The supposed doctrine of that case, as pointed out in *Laing et al. v. Taylor*, 26 C. P. 416, has not yet been applied to a bill of exchange.

In *Wake v. Harrop*, which was an action on a charter party, there was a demurrer to an equitable plea, so that all the facts alleged in the plea were admitted for the purposes of the decision. One fact alleged was, that "it was agreed and understood between and by T. Wilkenson (the testator) and the defendants that the defendants were only to sign the said charter as such agents, &c." Another fact alleged was, that defendants signed the charter party in the following manner: "*For* A. Davidson & Co., Messina, T. W., and J. C. Harrop & Co., agents."

The second of these facts would appear to be sufficient at law to defeat the action if it were upon a bill of exchange.

In this respect *Wake v. Harrop* resembles *Robertson v. Glass*, 20 C. P., 250, where, upon demurrer to a rejoinder and exceptions to a replication, the Court held that the defendant accepted the bill as or only in the character of an agent.

It is true that Crompton, J., in *Wake v. Harrop*, 1 H. & C. 202, 206, said: "This is not a case in which a contracting party says that he had no intention to be personally bound, but a case in which there was an express agreement between the parties, that the defendants should not be liable as principal. * * Therefore the plea discloses an equity similar to that in *Davies v. Stainback*, 6 DeG. M. & G. 679, for it is in equity a fraud to sue the defendants when it was agreed they should not be personally bound."

Now supposing "the express agreement" between the parties to the effect that defendant should not be personally liable to be the ground of decision of *Wake v. Harrop*, and to be a good ground of decision, and to be applicable to the drawer of a bill of exchange, the finding in this case is against it, and a contrary finding would not be supported by the evidence, for it is not clear that there was any agree-

ment or mutual understanding of the kind. The evidence in truth discloses no more than a misapprehension on the part of the defendant as to the legal effect of the signature to the bill.

Where there is nothing but a misapprehension or misunderstanding as to the legal effect of an instrument signed by a defendant, and no fraud is shewn in the obtaining of it, there does not appear to be any right in equity to resist its legal operation: *Powell v. Smith*, L. R. 14 Eq. 85, 90; *Campbell v. Edwards*, 24 Grant 152.

The rule is accurately expressed by Mr. Justice Gwynne in *Laing v. Taylor*, 26 C. P. 416, where he says, at page 429, "Equity does not interfere to relieve a party from the obligation of a contract which he has voluntarily entered into, under a misunderstanding or misapprehension of the legal effect of the contract, it may be, but where such misunderstanding or misapprehension was not induced by any fraud of the other party, and where the contract as drawn is not in violation of an agreement existing between the parties."

This statement of the law shews that the defendant in this case is upon the facts without defence, both at law and in equity.

WILSON, J., concurred.

MORRISON, J., having been appointed to the Court of Appeal, took no part in the judgment.

Rule absolute.

GIBSON V. THE CORPORATION OF THE CITY OF OTTAWA.

City corporation—Work done on parol contract—Liability for.

The plaintiff tendered, in February, 1875, to the defendants, the corporation of a city, for certain work to be done in improving a hill. The tender was accepted by the city engineer, and the work done between May and August, amounting to \$890. A by-law was passed in May to raise money for the improvement of this hill, and other purposes. In the estimates for 1876 \$5,000 was provided for as the balance for this hill, and in October a by-law was passed directing debentures to be issued to raise this sum with the other moneys required for the year. *Held*, that the plaintiff might recover, the claim having been approved of and provided for by defendants.

The plaintiff, under a contract with the water commissioners of the city, a body distinct from the defendants, was to do certain excavation for them, and to remove the material to a distance not more than 300 feet. The engineer of the commissioners, having first received the approval of the Chairman of the Board of Works, directed the plaintiff to break up this excavation, a good deal of it being rock, and to deposit it in thin layers on the arches of and approaches to a bridge within 300 feet. The work so done, in breaking up and spreading the stone, amounting to \$558, was a benefit, and was necessary to complete the bridge according to its original plan, but there was no order of council or minute of the Board of Works authorizing it: *Held*, that defendants were not liable.

DECLARATION. First count: that defendants on the twelfth of April, 1875, made their cheque or order for the payment of money directed to William H. Thompson, as chamberlain of the said city, and required him to pay to the order of the plaintiff the sum of \$676, and the same was duly presented for payment, and was dishonoured, and has not been paid.

Second count: common counts.

Pleas. 1. To first count: that defendants did not make the cheque or order.

2. To first count: that the cheque or order was not presented for payment,

3. To second count: never indebted.

4. To the whole declaration: payment.

5. To the whole declaration: that the causes of action, if any, and each of them arose before the passing of the Act respecting Municipal Institutions in the Province of Ontario, 36 Vic., ch. 48, for and concerning an alleged debt

to be incurred and falling due during the municipal year 1875, by the defendants, and for which debt, which was not within the ordinary expenditure of the corporation during the said year, no estimate was made by the defendants, nor any by-law passed by them for the creation of such debt, nor for imposing any rate over and above and in addition to all other rates whatsoever for the payment of the said debt.

Issue.

The cause came on to be tried at the last Spring Assizes at Ottawa, before Harrison, C. J.

The plaintiff was examined as a witness, and said: I tendered for the work on Major's Hill, on the 22nd February, 1875, which was accepted on the 13th of March, by Arthur Sawdon, the city engineer. I performed the work under the superintendence of Mr. Surtees, the successor of Mr. Sawdon. Mr. Surtees measured the work, and he agreed to my measurement of 12,717 yards—this is the first item, amounting to \$890.19. The second item amounts to \$676, it is for depositing earth on the different streets of the city. It was done by the direction of Mr. Sawdon, the city engineer. I got a cheque for that item. It is signed by the mayor. The fourth item, amounting to \$558, was done under the direction of Mr. Keefer. He was engineer of the water works. The sum charged for it is a poor charge for the work. The city had no engineer at the time. Pooley's bridge is one of the city bridges. Mr. Keefer told me I was to get my pay from the city. Have repeatedly made demand for these sums. I had a contract for excavation near Pooley's bridge. Deposited that excavation wherever I was directed by the engineer. The water commissioners are a body distinct from the city corporation. The road at Pooley's bridge was passable if I had not interfered with it. I made the charge for it at so much a cubic yard at Mr. Keefer's suggestion.

Thomas C. Keefer, said: I was engineer for the commissioners of water works, in 1873. There was work done by the plaintiff at Pooley's bridge, that year. The city

was building a new bridge across the gully on Queen street. Part of the plan was to fill up the whole width of the street for the length of the bridge, and a little more on each side to the depth of five or six feet. There was no city engineer at the time. I thought it desirable that some of the material taken from the excavation for the water works should be used for this purpose. I spoke to one or two aldermen. I think Mr. Bangs was one, he was at that time chairman of the Board of Works. He told me to act as I thought best, and I gave instructions to the plaintiff, who was engaged on the water works, to do the work. It formed part of the construction of Pooley's bridge, which (bridge) was a city work. Owing to that being done there was no interruption of the traffic, it completed the bridge. If it had not been for that, the traffic would have been diverted. The work was done under my order. The charge made by the plaintiff, is reasonable.

Cross-examination : The plaintiff, under his contract with the water commissioners, was bound to remove the stuff excavated within 300 feet of where it was excavated, and to put it where I required him. The place he put it was within 300 feet. If he had not interfered with the street, it would have been passable. The claim is not for delivering the stone, it is for breaking it up and spreading it in thin layers. It was not covered by his contract with the commissioners.

Peter Featherston, said : I was for several years mayor of Ottawa. Pooley's bridge work was done in 1873. I was not mayor during that year. By-law No. 310, was passed on the 6th of November, 1871, for the purpose of building Pooley's bridge, and other bridges, and for repairing bridges. By-law 337, was passed on the 26th of September, 1873, for the completion of the bridges in the course of erection, and the approaches thereto, and for other purposes. The approach to Pooley's bridge was necessary. The city benefited by the work done there by the plaintiff. In my opinion it was necessary work. By-

law 371, was passed on the 31st of May, 1875, to raise money for paying the outstanding floating liabilities of the city not covered by debentures, the improvement at Major's Hill, and for other purposes. By-law 398, passed 16th October, 1876, for raising money to pay the floating liabilities of the city not covered by debentures, the improvement of Major's Hill and other purposes. Mr. Bangs was chairman of the works in 1873. There was no distinct estimate for the by-law 337, of 26th September, 1873.

Frederick Wise said: I was resident engineer of the water works in Ottawa. I remember the work done by Gibson, on Pooley's bridge. It was done in 1873. He made the approaches and filled in the roadway over the course of the arches. The work was well done, and was necessary work. The temporary approach at one end was not sufficient for city traffic. The amount charged by plaintiff is less than it would have cost the city if it had been done by any other person than Gibson. His contract with the water works enabled him to do the work more cheaply than another.

For the defence.

Erskine Bronson said: I was a member of the city council in 1873, 1874, 1875. Major's Hill is the property of the Government, not of the city. The estimates for 1875 do not include this work. There was an appropriation of \$10,000 in 1875, in respect of Major's Hill. That sum was not on hand at the end of that year. It was over drawn for work done at Major's Hill, excluding the road in question. There was no appropriation for the work done in respect of which a cheque for \$676 was issued to the plaintiff. Pooley's bridge was used for traffic before the plaintiff deposited material there. The council in no manner authorized the work. When the plaintiff's account was presented, it was repudiated: (Report of the 16th of February, 1874, of the Board of Works.) There was no estimate for that work. No money was raised to pay it. I am now chairman of the finance committee. It is my second year.

Cross-examination: There was a sum of \$50,000 raised

under by-law, 310, for bridge purposes. Under by-law 337, \$58,000 was raised for bridges and approaches. Under by-law 371, £2,000 sterling was raised, but not for bridge purposes. By-law 398, authorizes \$130,000 to be raised for outstanding cheques, and floating liabilities, &c. The cheque for \$676 was included in this by-law for unpaid cheques. The work at Pooley's bridge was a benefit to the city, but the bridge was passable before Mr. Gibson did any work on it. It would not have been completed according to Mr. Perry's original plan, without the work done by Mr. Gibson. Mr. Perry was city engineer, and made the plan for the city in 1871. The cause of the rejection was the belief that Mr. Gibson had under his contract with the Water Commissioners to do that work.

Re-examined: The estimate on which by-law 398, was based, was unpaid cheques for 1875 only. It also included new work to be done at Major's Hill. The by-law based on this estimate is to cover floating liabilities. Unpaid cheques of 1875, 31st December, of \$51,248.36. Balance for Major's Hill, 5,000.

The plaintiff was recalled.

The work on Major's Hill was done between May and August, 1875, both inclusive. The work charged for by me at Pooley's bridge was not covered by my contract with the Water Commissioners. My work was the first work done in the improvement of Major's Hill.

It was admitted the Government had given Major's Hill to the city for a park in 1874.

The case was argued by the counsel for the respective parties.

The learned Chief Justice found a *pro formâ* verdict for the plaintiff, for the first, second and fourth items. The third item, a small one, not being pressed, at his suggestion, with leave by the defendants to move to enter a verdict for them, or to have a nonsuit entered. Verdict for plaintiff—damages, \$2,124.19.

During Easter Term, May, 25, 1877, *Bethune*, Q. C., obtained a rule for the defendants, calling on the plaintiff to shew cause why the verdict entered for the plaintiff should not be set aside, and a verdict entered for the defendants, on the grounds that the plaintiff did not shew any contract with the defendants, nor any evidence of acceptance of the work, except as to the cheque for \$676. That there was no estimate for the amount claimed, and no appropriation made for it. That the claim was not for an ordinary expenditure of the city; and even if there had been an appropriation for the work, the amount of the appropriation had been exceeded by the city before the work was done.

During this term, November 24, 1877, *Beaty* Q. C., shewed cause. Plaintiff's tender was accepted for the work charged for in the second item. A cheque was given for it, but the cheque has not been paid, \$676. [*Bethune*, Q. C. Upon the evidence, the plaintiff is entitled to that sum.] There remain now only two items. No. 1 for work done at Major's Hill, between May and August 1875. The by-law 371, passed the 31st of May, 1875, and by-law 398, passed the 16th of October, 1876, both provide means for the improvement of Major's Hill, and for the payment of outstanding liabilities, not covered by debentures. And the charge for that item of claim was therefore covered by, and included in the moneys so raised for them and for the other purposes of the by-laws. See also, the statement of requirements of the 30th June, 1876, p. 254, Major's Hill improvements, \$6,186.94, and p. 257, balance for Major's Hill, \$5,000 (a).

As to the fourth item, the work done at Pooley's bridge. The city raised money to build that bridge, and did build it. The approaches to it were also provided for by by-laws 337 and 371. The report of the finance committee, of the 5th of August, 1873, recommending \$33,000 for "completion of bridges and approaches," was adopted by the coun-

(a) These figures are taken from the Report of the Board of Works, put in at the trial.

cil, on the same day. At p. 85 of the minutes of council, of the 12th of April, 1875, adopting the report of the finance committee, "\$15,000 for bridges at Chaudiere," was recommended by the committee, and was adopted by the council. Mr. Featherstone's evidence is important for the plaintiff, and the evidence of every witness shows the work was of great value to the city, and was moderately charged for. He referred to *Nicholson v. The Guardians of the Bradfield Union*, L. R. 1 Q. B. 620; *Pim v. The Municipal Council of Ontario*, 9 C. P. 302; *Buffalo & Lake Huron R. W. Co. v. Whitehead*, 8 Grant 157; *Perry v. The Corporation of Ottawa*, 23 U. C. R. 391; *Brown v. The Corporation of Belleville*, 30 U. C. R. 373; *Hughes v. Canada Permanent Building and Savings Society*, 39 U. C. R. 322; *McBrian v. The Water Commissioners for the City of Ottawa*, 40 U. C. R. 80; *The Royal British Bank v. Turquand*, 5 E. & B. 248; *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642; *Pollock on Contracts*, 106, 115.

Bethune, Q. C., supported the rule. As to item No. 1, the plaintiff, it appears, did the work on Major's Hill, but the funds which were raised for it have all been expended, and no estimate has been made of the plaintiff's claim, nor has any money been raised for it, and he cannot recover for it.

As to item No. 4, that was work done not by the authority of the city, but by the order of Mr. Keefer, the engineer of the water commissioners, under whom the plaintiff then had a contract. The city have never admitted the plaintiff's claim. They rejected it. However beneficial the work may have been for the city, he cannot make the city pay for it. There was no contract, no approval of what was done, no promise to pay for it, no estimate made in respect of it, and no money raised for it. And it is not a charge as for an ordinary expenditure.

December 28, 1877. WILSON, J.—The second item having been admitted, I have only to deal with the first and fourth items; the third item was withdrawn at the trial

As to the first item, for the work done on Major's Hill. There was a tender by the plaintiff to the city, in February, 1875, and an acceptance of that tender by the city engineer in March, 1875, and the work was done between May and August, of that year. By-law 371 was passed on the 31st of May, 1875, for raising money for "the improvement of Major's Hill," and for other purposes. Then in the estimates for the year 1876, a sum of \$5,000 is provided for as the "balance for Major's Hill," and By-law 398, was passed 16th of October, 1876, directing debentures to be issued to raise that sum, with the other moneys required for the year. I do not think it is infringing upon any decided case, nor assuming too much to say that the plaintiff's claim for that item was approved of and provided for by the city council, and the amount of it raised to meet his demand, and therefore that item should be allowed.

As to item No. 4, I am not of opinion it can be recovered by action. The plaintiff was, at the time he did the work, under a contract with the water commissioners to do certain excavation for them, and he was bound by his contract to remove such material to a distance not more than 300 feet from the place of excavation. Mr. Keefer, the engineer of the water commissioners, arranged with the plaintiff that he should break up the excavation—a good deal of it rock—and carry it to and deposit it at Pooley's bridge, a distance within 300 feet of the place of excavation. Mr. Keefer saw the chairman of the city board of works, and he approved of it, and the work was done.

There was no order of council nor minute of the board of works, nothing more than the verbal assent or order of the then chairman of the board of works. The council never agreed to pay for the work; on the contrary, they have repudiated the claim and have refused to pay for it. The plaintiff does not charge for the mere removal of the material from the place of excavation to the place of its deposit, for he was bound to do that by his contract with the water commissioners, but for breaking up the stone and spreading it in thin layers on the arches of the bridge,

and on the approaches to the bridge. It is no doubt a benefit to the city authorities and the public, although the place was passable before the plaintiff did his work upon it.

The council rejected the plaintiff's claim because they were "under the belief that Mr. Gibson had, under his contract with the water commissioners, to do this work," and that now turns out not to be the fact, and it is admitted that the bridge would not have been completed according to the plan of it without the work being done to it which no one did but Mr. Gibson.

Although the plaintiff has done the work he claims payment for, which was necessary to be done to finish the bridge, and although it is a benefit, and although the council has, from time to time, raised money to finish that work with others, and to pay off claims not covered by debentures, I cannot, as a matter of law, say the defendants are obliged to pay for the work.

They did not order it, nor accept it, in any other sense or manner than by using the road, or permitting travel to, be made upon the material the plaintiff put upon the road and which travel they could not prevent, and which material they were not bound to remove. They have not agreed to pay for it, but the contrary. They have not raised money to pay plaintiff's the claim, and they cannot in any way be made liable for it.

A municipal body is, by law, protected from many claims for which a private person would be liable, and it is right for the sake of those whom the councils of such bodies represent that it should be so, otherwise the ratepayers would be exposed to many unreasonable and extortionate demands. I say the defendants are not obliged to pay this item of work simply because they never contracted for the plaintiff's services, nor agreed to pay him; and no implied contract can be established against them because the plaintiff did work and labour and expended materials on their road, and the public have taken the benefit of such labour and materials. It is a matter for the council alone to say whether, as they refused to pay for this item for a

cause which now appears to be an error, they will admit it, as it is manifestly a public benefit, and as it is in truth but the completion of the work which they stipulated for, but which the plaintiff alone performed.

As the fourth item of \$558 is not allowed, the damages which were assessed at \$2,124.19 will be reduced by the above \$558, leaving \$1,566.19, to which we think, the interest, \$59.50, should be added, making his damages \$1,625.69.

The rule will be drawn up accordingly.

HARRISON, C.J., concurred.

Rule accordingly.

THE OXFORD PERMANENT BUILDING AND SAVINGS SOCIETY
V. THE WATERLOO COUNTY MUTUAL FIRE INS. CO.

*Policy of insurance—Assignment to mortgagee—Payment of mortgage—
Forfeiture by assignor.*

The plaintiffs sued on a mutual fire insurance policy granted to one F., for \$2000 on certain property mortgaged by him to the plaintiffs alleging that defendants covenanted with the plaintiffs to pay to F., or his assigns, all loss not exceeding \$2,000; and that as to \$400, the plaintiffs sued in their own right, and as to the remaining \$1,600, as trustees for F. The defendants pleaded that after F. assigned the policy to the plaintiffs, he paid to them the whole of their mortgage pursuant to the condition on which it was assigned, and that before the loss F. was duly assessed on the premium note, and neglected to pay, by which the policy became void. The condition on which the policy was assigned was, that on payment of the mortgage money by F. to the plaintiffs, the assignment should be void: *Held*, that the plea shewed a good defence, for the performance of the condition put an end to the plaintiffs' title, and as F. could not have recovered, neither could the plaintiffs as trustees for him.

DEMURRER. The action was by the plaintiffs as the assignees of a policy of the defendants, granted to one John Forrest, under the statute, to the extent of \$2,000, on certain property which he had mortgaged to the plaintiffs.

The declaration alleged that the defendants covenanted with the plaintiffs, according to the statute, that they

would pay to John Forrest, or his assigns, all loss not exceeding the \$2,000.

And that in case the premiums assessed on the note given were not paid within thirty days after it became payable, the policy held by the persons in default should be void.

It was provided by the policy that if the mortgagee should insure the property or his interest in it with any other insurance company, the policy of the defendants should be good for the balance only of the policy granted by them after deducting the amount insured with the other company.

It was also provided that if Forrest "should pay the said mortgage money to the said company then the said assignment should be void and the said John Forrest reinstated in all his rights under said policy."

The declaration stated that the plaintiffs, as to \$400 of the \$2,000, sued for it in their own right, and as to the remaining \$1,600, as trustees for Forrest.

The defendants, when the case was before the Court lately, had pleaded third, fourth, and fifth pleas, to which the plaintiffs demurred, and judgment thereon was given for the plaintiffs.

No written judgment was given, but it was said by Wilson, J., in giving the judgment of the Court, that the case was governed by the judgment given on the same day, November 26, 1876, in *The Mechanics' Building and Savings Society v. The Gore District Mutual Fire Ins. Co.*, since reported in 40 U. C. R. 220.

The third plea was pleaded to the \$400 claimed by the plaintiffs in their own right. The fourth plea as to the \$1600 claimed by the plaintiffs as trustees for Forrest, and the fifth plea as to the whole \$2,000.

These pleas were in effect alike. They alleged that Forrest alone gave the premium note, and that no person or persons, or body or bodies corporate other than Forrest ever was or were the assured under the policy, or ever was or were a member or members of the company in respect of the alleged insurance or policy: that the defendants made an assessment of \$80 upon the note, which assess-

ment was payable on or before the 25th of November, 1875, at the office of the company, in the village of Waterloo; and the defendants duly notified Forrest of such assessment, which notice he duly received, and that the assessment was not paid within thirty days, or at any time before or since, and was unpaid at the time of the fire, by reason whereof the policy became void as to the claim pleaded to.

The fifth plea, besides alleging that no other person than Forrest ever was assured under the policy, added that Forrest was the person intended and referred to in the conditions set forth in the declaration as being the person holding the said policy of insurance.

Since judgment was given on these pleas the defendants by leave added the sixth and seventh pleas.

The sixth plea repeated the third plea, and then continued: that after Forrest assigned the policy to the plaintiff, and before the commencement of this suit, he paid to the plaintiffs the whole of the mortgage money pursuant to the said mortgage and to the condition on which it was assigned, "and before the alleged loss Forrest was duly assessed on the premium note or undertaking as in the third plea alleged, and neglected to pay the same for more than thirty days after due notice thereof, as in the third plea alleged, whereby the policy became void."

The seventh plea repeated all the third and sixth pleas, and it added that the consent of the directors of the defendants' company, with which Forrest assigned the policy to the plaintiffs, was and is in the words and figures following:—

"The Waterloo County Mutual Fire Ins. Co. hereby consent that the interest of John Forrest in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to the Oxford Building and Savings Society."

The second replication to the sixth plea, on equitable grounds as to the \$400, stated that the assignment of the policy was only as security for the loan in the declaration mentioned, and the plaintiffs were and are trustees for

Forrest for all moneys payable under the policy, and they maintain this action as such trustees: that at the time of the loss there was due to the plaintiffs by Forrest \$400, which was not paid by Forrest to the plaintiffs till after the loss: that the defendants assented to the assignment of the policy to the plaintiffs, and the assignment thereof was made before the assessment in the third plea mentioned, and at the time of the assessment made, and of all the various acts and defaults in the third plea mentioned, the plaintiffs were the owners of, and assignees of, the policy, as in the declaration mentioned, to secure them the sum of \$1,170, then unpaid to them by Forrest in respect of the mortgage, and were trustees for Forrest in respect of the residue, and the defendants never required any premium note, or undertaking, or security for the payment of the premium note, or the assessment to be made thereon, nor did the defendants give notice to the plaintiffs of the said assessment, or of the default of Forrest, until the pleading of their third plea, nor had the plaintiffs until such time notice or knowledge of the said assessment, but they now offer to allow the defendants to retain out of the moneys in the declaration mentioned, the amount so due and payable in respect of the assessment.

The third replication to the sixth plea, on equitable grounds, as to the \$1,600, was in like form as the preceding replication.

The fourth replication to the seventh plea, on equitable grounds as to the \$400, was like the second replication to the sixth plea.

The fifth replication to the seventh plea, on equitable grounds as to the \$1,600, was like the second replication to the sixth plea.

Demurrer to second, third, fourth, and fifth replications.

Because the replications admit the non-payment of the premium by Forrest, as alleged in the sixth and seventh pleas, and the payment of the mortgage by him to the plaintiffs, and shew there was no obligation on the plaintiffs to pay premiums, and therefore the non-performance of the

conditions precedent to liability on the part of the defendants, the due payment of premiums by the insured, and the matter alleged is a departure from the declaration.

Joinder.

October 2, 1877. *S. Richards*, Q. C., for the demurrer, *Bowlby* with him. The declaration shews that the assignment of the policy to the plaintiffs was conditional only, namely, until the payment of their mortgage money by Forrest, and yet they claim the whole \$2,000 of the insurance money, although they state their unpaid mortgage debt was only \$400 at the time of the action brought.

The plaintiffs were not, by the assignment given, the persons insured. The policy was not, according to the statute, ratified and confirmed by the defendants to the plaintiffs, according to the language of the statute. The assent to the assignment of the policy to the plaintiffs was only such an assent as prevented the defendants from setting up that Forrest had assigned the policy without the leave of the company. It is the ratification and confirmation alone which gives the assignees of a mutual insurance policy the right to sue in their own names: 36 Vic. ch. 44, sec. 39, O. The mortgagor's premium note was retained by the defendants, he was the only person they had to deal with. As the assignment was conditional only, it was not the assignment of a money demand, nor of a chose in action: *Wood v. McAlpine*, 1 App. 234; *Bank of Hamilton v. Western Ass. Co.*, 38 U. C. R. 609; *Hostrawser v. Robinson*, 23 C. P. 350. As the sixth and seventh pleas shew, the plaintiffs' mortgage debt was entirely paid off by Forrest before the commencement of the suit. The plaintiffs, if they can sue as trustees for Forrest, which is denied, must be subject to such defences which would have been available to the defendants if Forrest had been the plaintiff, and therefore the non-payment by Forrest of the assessment pleaded is a good defence to the plaintiffs' suit as trustees for Forrest. The plaintiffs' claim to the policy and to bring this action have completely ended by the payment of their debt by Forrest, for their title was con-

ditional only, and was determined by the payment of their debt. The former judgment given in this case on the third, fourth, and fifth pleas was given on the assumption that the plaintiffs had a legal claim for their own benefit to the whole insurance money, and it was not noticed then by the Court that the plaintiffs expressly admitted that they were suing only as trustees for the \$1,600, and now by the sixth and seventh pleas it is shewn the plaintiffs are in fact suing as trustees for the whole \$2,000.

Osler contra. The former judgment, whether it is right or not, is now binding on this Court, and the fact that it now appears the \$400 which the plaintiffs claimed the right to sue for for their own benefit, has been now shewn to have been before this action paid to the plaintiffs by Forrest, can present no new view of the case upon which to give a different judgment, because it appeared before the plaintiffs were suing as trustees for \$1,600, and yet as to that sum Forrest's default towards the company was held to afford no defence.

October 9, 1877 WILSON, J.—It has been decided in this Court that a mortgagee who becomes the assignee of a mutual policy, although he does not give his premium note, and is not liable to be assessed for the payment of losses, is a person who is insured in his own name and right; and that no act of the mortgagor, whose premium note is retained by the company for the purpose of assessment, such as a further insurance by him, will avoid the mortgagee's insurance, although it is by the policy a forfeiture of the mortgagor's interest.

It must have been decided in this case when the third, fourth, and fifth pleas were argued, and judgment was given against them, that the plaintiffs were entitled to maintain this action, notwithstanding the default of Forrest, the original insured, to pay the assessment upon his premium note after notice to him requiring payment.

These two matters I must consider myself as debarred from considering, for I cannot sit in review upon the judgment of the Court.

It is said the Court must have overlooked the fact that the plaintiffs were making a claim for only \$400 in their own right as the only part of the mortgage money which remained unpaid by Forrest, and that the remaining \$1,600 was claimed by them only as trustees for Forrest, and that although the plaintiffs may have been entitled to recover the \$400, notwithstanding Forrest's default, they should not have got judgment for the \$1,600 for Forrest's benefit, when Forrest had, as against himself at any rate, forfeited all right to recover.

I still think that the plaintiffs were entitled to recover for the \$400, the money claimed by them in their own right, because the forfeiture of Forrest was not their forfeiture, as they had no notice or knowledge of the assessment being made, or of Forrest's default, and they were entitled to such notice, because in my opinion they were insured by the company by reason of the assignment assented to by the company independently of Forrest.

As to the \$1,600, I confess I do not see why the fourth plea, which was pleaded as to it, and which set up Forrest's default as a bar to the plaintiffs' recovery as trustees for him, is not a good defence, and why the defendants should not have had judgment upon it, and it is very likely the difference between the claim for the \$400 and that for the \$1,600 may have been overlooked.

I have now, however, only to deal with the newly added sixth and seventh pleas. I believe their meaning to be to set up a payment by Forrest to the plaintiffs in full of all their claim against him on the mortgage, so that, as to the whole insurance money of \$2,000, the plaintiffs are suing only as trustees for Forrest. But the pleas are so needlessly encumbered with the repetition of the third plea, which adds nothing to their strength or effect, that it is not quite easy to say what defence in particular, or how many defences the pleader wanted to set up.

Taking payment to be their meaning and purport, it seems to me they shew the plaintiffs have no longer any right to sue, because the condition, on which the policy

was assigned to the plaintiffs, was, "that if the said John Forrest should pay the said mortgage money to the said company, then the said assignment should be void, and the said John Forrest be re-instated in all his rights under the said policy," and that condition was performed before the commencement of this action.

It is stated in the declaration that "the defendants did thereby, in consideration of the premises, covenant with the plaintiffs according to the provisions of the said Act, to pay to the said John Forrest, or his assigns, all loss or damage by fire not exceeding," &c.

That covenant, if there be such a thing, does not prevent the defendants from shewing that John Forrest, by payment of his debt to the plaintiffs in full, is now the owner at law of the policy, and that the plaintiffs' title has by express agreement been determined.

On the ground of performance of the condition, which put an end to the plaintiffs' title, I can determine the question as well to the \$400 as to the \$1,600 in favour of the defendants; and in that way I do not interfere with the judgment of the Court which was pronounced on the fourth plea as to the \$1,600, that the plaintiffs were entitled to recover that sum, although trust money for Forrest who had committed a default in the payment of his assessment.

If I were at liberty to review the judgment on that plea, I would hold it as I have before said a good defence; and if I could decide the sixth and seventh pleas upon that ground, I would hold them to be a good defence, because they shew the whole \$2,000 now is a trust claim, and it is admitted that Forrest did forfeit his claim to sue for it by reason of the non-payment of the assessment.

I am also of opinion the replications are a departure as to the \$400, by setting up that the plaintiffs, contrary to their declaration, now sue for the \$400 in trust for Forrest.

Judgment for defendants on the demurrer to the sixth and seventh pleas.

This judgment was reheard by plaintiffs before the full Court, in this term, November 26, 1877.

Osler, for the appeal, *Richards*, Q. C., and *Bowlby*, contra.

The arguments were similar to those before Wilson, J., ante p. 185.

Judgment was given on the conclusion of the argument.

HARRISON, C. J.—The plaintiffs have no greater right than Forrest would have if suing in his own name. If otherwise, a person need only appoint a trustee and sue in his name, when by breach of a condition he could not sue in his own. It is quite clear Forrest could not recover, and if so, the plaintiffs cannot recover. I say nothing as to departure.

MORRISON, J.—I concur. I do not think the question arguable.

WILSON, J., adhered to his previous judgment.

Per Cur.—Judgment affirmed, with costs to plaintiffs in the cause. Third and fourth pleas struck out.

Judgment affirmed.

HALL V. EVANS.

Window light—Action for obstruction of—Right by prescription—Change of position of windows.

Defendant in 1855 or 1856 built a house on his lot adjoining the plaintiff's, having three windows looking out upon the plaintiffs' land. In 1864 the defendant raised his house more than three feet, and none of the windows being more than three feet high, the position of each of them was thus entirely changed : *Held*, that he had acquired no right under the statute, C. S. U. C., ch. 88, sec. 38 for that he had not enjoyed the access or use of the light *at the same place* for the statutory period.

Defendant claimed title by possession for ten years to a small strip of the plaintiff's land, 34 inches in width adjoining his own, having used it for the purpose of banking up his cellar : *Held*, that this claim was properly found against him, such possession being too uncertain, and insufficient.

FIRST count: Trespass *quare clausum fregit*, on lot 4, on the south side of Wellington Street, in the city of Ottawa, and a certain other portion of land adjoining the last mentioned lot in the rear or south end thereof, being one foot and ten inches in breadth from north to south, and extending easterly and westerly the whole breadth of the lot.

2nd count. Trespass *de bonis*, as to a quantity of board, scantling, timber and lumber.

Pleas. 1. Not guilty.

2. As to the portion being one foot and ten inches in breadth, from north to south, and extending easterly and westerly the whole breadth of the lot, land not the plaintiff's, and not guilty as to the residue.

3. As to the same portion, *liberum tenementum*, and not guilty as to the residue.

4. As to the whole declaration : that defendant was possessed of a certain lot of land, being composed of the east half of lot number four, on the north side of Sparks Street, in the city of Ottawa, whereon was situated a dwelling house of the defendant, wherein he was entitled to have the light and air enter through certain windows in the said dwelling house, and plaintiff prevented and obstructed the light

from entering into the said dwelling house through the said windows, by erecting against, and fastening, and nailing to the said dwelling house, and over and across the said windows, and upon the defendant's lot, a wall or fence composed of boards, scantling, timber and lumber, and defendant removed the said obstruction, doing no more injury than was necessary.

5. As to the whole declaration, alleging obstruction of the light through ancient windows, and entry upon the land of the plaintiff for the purpose of removing the obstruction, doing no more injury than was necessary for that purpose.

Replication.

1. Issue on all the pleas.

2. That the plaintiff sues not only for the causes of action in the fourth and fifth pleas admitted, but for other trespasses committed by the defendant at other, times for other purposes, and to a greater extent than those referred to in the fourth and fifth pleas.

Plea to the new assignment, not guilty.

The cause was tried at the last Ottawa Assizes, before Ross, Co. J., sitting for Burton, J. A., without a jury.

Plaintiff and defendant are the owners of adjoining lots of land in the city of Ottawa.

Wellington Street and Sparks Street in the city of Ottawa are laid out so as to run from east to west, and are nearly parallel to each other.

The distance between the two streets at the place in question is about 198 feet or ninety-nine feet from each street to the centre of the block.

The lot belonging in part to the plaintiff, fronts on the south side of Wellington Street, and is known as lot number four, on the south side of Wellington Street.

The lot belonging in part to the defendant, is known as lot number four, on the north side of Sparks Street.

The two lots are supposed to meet in the rear in the centre of the block between the two streets.

There is a house on the rear of the defendant's lot. The edge of its roof, according to the testimony of Robert

Sparks, a Provincial Land Surveyor, comes up to the dividing line between the plaintiff's lot and the defendant's lot.

The defendant's house was built in 1855 or 1856. Three windows were, when the house was built, placed in the house looking to the north, and into the plaintiff's lot, a fourth window looking in the same direction, in 1857, was afterwards placed in the lower part of the main building. None of the windows was more than three feet in height.

In 1864 the defendant raised his house more than three feet, and so none of the windows was therefore in the same position as before the alteration.

There was a good deal of evidence bearing upon the possession of the piece of land underneath the roof of defendant's house, being about one foot ten inches in width, and the whole length of the lot.

Mr. Sparks was of opinion that this piece of land belonged to the plaintiff's lot, but defendant claimed to have acquired title by possession through making use of it since 1866, occasionally for the purpose of banking up the cellar of his house. Plaintiff also claimed to have occupied it.

Disputes arose between the parties as to the ownership of this strip, and principally as to the right of the defendant to remove whatever was placed on the rear of the plaintiff's lot, and obstructed the light from the defendant's windows.

Whatever fence the plaintiff placed on the rear of his land was knocked down by the defendant in assertion of his claim to light, and on two occasions that was done, and the lumber belonging to the plaintiff destroyed, and his labour lost.

The plaintiff on the 4th of July, 1876, commenced this action for the purpose of settling, if possible, the contentions existing between the defendant and himself.

Many witnesses were examined on each side, at the trial, and the result will be found in the finding of the learned Judge who tried the case.

It was as follows:—

Three questions arise in this case, first, as to the ownership of the strip of land, of one foot ten inches at the south end of the plaintiff's land, apart from any title acquired by prescription; second, whether a title has been acquired thereto by possession; third, as to the defendant's right to easement of light and air to his windows.

The evidence of Mr. Sparks, Provincial Land Surveyor, apart from any other evidence, satisfies my mind beyond all doubt that the said strip of land forms part and parcel of the plaintiff's lot four, south of Wellington Street. It is not necessary that I should waste the time of counsel in stating at length why this evidence leads my mind to this conclusion.

The next question is, has the defendant acquired title to this strip of land by possession? I think he has not. It is true the defendant's evidence shews that his house occupied part of this strip of land from 1855 to 1864. In the latter year his house slipped south, on the occasion of raising it for the purpose of putting under it a stone foundation, beyond the southern limit of the strip of land, and has remained there ever since. The mere fact of the defendant every year since 1864 covering up his cellar windows with earth or other substance to a breadth of eighteen inches, and removing such covering every spring, is not such a possession as would warrant me in holding, that it divested the rightful owner of his freehold of inheritance. Even if there was such possession, the evidence is too uncertain, to enable me to say to what precise part of the strip of land prescriptive title has been established. I am, therefore, of opinion that the defendant has not proved a title to the disputed part by possession.

The next enquiry is, whether the defendant has acquired the prescriptive right of easement of light to his windows. I shall first consider the evidence as it applies to the kitchen window, and the two upper windows in the north end of the defendant's main building. The defendant himself, Bishoprick, and Stanly, swear positively that defendant's house was built and occupied by him in the fall of the year 1855, and each of these three witnesses is confirmed by facts and circumstances—the defendant by the entries in his books of account. Bishoprick by the entry in his book against Foxon, made in 1855, as he swears; and Stanly by the entries in his family bible, and by the clergyman's certificate of his son's baptism. The entry in Bishoprick's book is not very

satisfactory, but he swears in the most precise and positive manner to the charge against Foxon being made in September, 1855, and it does not appear to me probable, if even possible, that the entries in defendant's own book or account, in Stanly's family bible, and the entry of date of his son's baptism in the church records, could have been manufactured or concocted for the purpose of this or any other case. Mr. Stanly has displayed such retentiveness and accuracy of memory on collateral matters that it has made a strong impression on my mind as to his recollection of dates. It is true that he has exhibited throughout the case a strong bias and active zeal on the side of the defence, but this alone would not, in my judgment, justify me in disbelieving his evidence. To displace this direct and circumstantial evidence, the plaintiff adduces no tangible, no satisfactory evidence. On the contrary, I am of opinion that the evidence of two of his witnesses, Hawkins and White, taken together, rather confirm the testimony adduced by defendant on this part of the case. I am, therefore, clearly of opinion that the defendant has proved by sufficient and satisfactory evidence his enjoyment for twenty years before the commencement of this action of easement of light to the said three windows. He had therefore, at the time of committing the alleged trespasses, and has now a right to the light to his dominant tenement for these three windows over the plaintiff's servient tenement. He had, therefore, the legal right to knock down the plaintiff's wall which obstructed the light, as far as the lower end of these three windows, and his doing so was no trespass.

As to the fourth window in the lower part of the defendant's main building, the evidence of White shews it was not in the building when he left defendant's service in June, 1857; and the defendant himself, in his evidence, states that it was put in the building in the fall of 1857, or the early part of 1858. For this window he had not acquired a prescriptive right to an easement of light. He knocked down the wall to below the lower end of this window, and in doing so he committed a trespass.

Upon the whole, I think the plaintiff is entitled to a verdict on the first, second, fifth, and sixth issues, and one shilling damages, and the defendant on the third and fourth issues.

The learned Judge, however, being much pressed by counsel, entered a verdict for the defendant on the first,

fourth, and fifth issues, and for the plaintiff on the second, third, and sixth issues, and one shilling damages.

But after entering the verdict, the learned Judge made the following note in his book :—

“ Since entering the verdict in the above case, I stated to counsel on both sides, that upon consideration I was clearly wrong in entering the verdict for the defendant on the first issue, that on the contrary I ought to have entered the verdict on that issue for the plaintiff, as I had at first determined to do. I further stated to the counsel that I would make a memorandum to that effect in my notes. At the request of Mr. Lees, plaintiff's counsel, I also certify to the Court that if the Court should be of opinion, that the plaintiff is entitled on all the issues, the damages in that case awarded to the plaintiff should be \$15, instead of one shilling.”

During this term, November 21, 1877, *Beaty*, Q. C., on the part of the plaintiff obtained a rule calling on the defendant to shew cause why the verdict on the first, fourth, and fifth issues, or some or one of them, should not be set aside, and a verdict entered for the plaintiff thereon, or on some of them, with damages at fifteen dollars, instead of one shilling, or why there should not be a new trial, on the grounds :

1. That the said verdict, on the law and evidence, should be general, and for the plaintiff, with the damages aforesaid.

2. That the verdict for the defendant is contrary to law and evidence, and the weight of evidence.

3. That a continuous and uninterrupted easement or user of light, as alleged, was not had or enjoyed by the defendant for twenty years, over the land of the plaintiff.

5. That the defendant altered, extended, and elevated the position of the windows in the year 1864, and removed and raised the height of the building in which the windows were, and changed its site, and the location and position of the windows, so that they in fact became new windows as of that date, and subsequently, therefore, the user was not of the old windows of sufficient length of time, nor yet of the new, to give him the right as of an ancient window.

During the same term, and on the same day, *Ferguson*, Q. C., for the defendant, obtained a rule calling on the plaintiff to shew cause why the verdict entered for the plaintiff on the second, third and sixth issues should not be set aside, and a verdict entered for the defendant upon the said issues, or why a new trial should not be had between the parties, on the ground that the said verdict is contrary to law, evidence, and the weight of evidence.

Both rules were argued at the same time, during the same term, November 30, 1877.

Beaty, Q. C., for the plaintiff, shewed cause to the defendant's rule, and supported his own rule. The finding of the learned Judge in favour of the plaintiff, on the evidence as to the ownership or possession of the small strip of land in dispute between the parties, ought not to be interfered with, and the issues as to the alleged easement ought also to be found in favour of the plaintiff, as the alleged easement was not proved to be an actual and continuous one for twenty years next before action. He cited *Jones v. Tapling*, 11 H. L. 290; *Goddard on Easements*, 2nd ed., 302, 303, 306; *Renshaw v. Bean*, 18 Q. B. 112; *Hutchinson v. Copestake*, 9 C. B. N. S. 863; *Heath v. Bucknall*, L. R. 8 Eq. 1; *Blanchard v. Bridges*, 4 A. & E. 176; *Brummell v. Wharin*, 12 Grant 283; *Bigger v. Allan*, 15 Grant 358; *Gale on Easements*, 5th ed., 174, 587, 599.

Ferguson, Q. C., for the defendant, shewed cause to the plaintiff's rule, and supported his own rule. The learned Judge was not justified by the evidence in holding that the disputed piece of one foot ten inches formed any part of the plaintiff's lot, and even if this were otherwise, the evidence of defendant's possession since 1864 was enough to extinguish the plaintiff's title to it. He cited as to the defendant's right to the easement of light, *Gale on Easements*, 5th ed., 604, notes.

December 28, 1877. HARRISON, C. J.—The chief matter in dispute between the parties to this action, when the action was commenced, was, the right of the defendant to

prevent the plaintiff so building on his own land as to obstruct the light to the windows of the defendant's house.

Subordinate to this was the dispute as to the ownership of the small strip of land, one foot ten inches in width, and running the whole width of the respective lots of land owned by the parties.

The evidence bearing on the latter dispute was contradictory, but the learned Judge who tried the cause and had the advantage, which we do not possess, of seeing and hearing the witnesses, has found the issues arising out of that dispute in favour of the plaintiff.

We do not think it would be in furtherance of justice to disturb that finding on the alleged ground that it is against law, evidence, or the weight of evidence.

We cannot say that there was no evidence to sustain the decision of the learned Judge in this disputed matter of fact, and we ought not to treat with less respect the deliberate verdict of a Judge as to a matter of fact, than the deliberate verdict of a jury under similar circumstances.

We do not feel so confident that a contrary conclusion to that reached by the learned Judge was the correct one as to make it our duty to reverse his verdict.

We cannot in such a case accept the alternative of granting a new trial, for "a new trial ought only to be granted to attain real justice, and not to gratify litigious persons upon every point of *summum jus*." See *Farewell v. Chaffey, et al.*, 1 Burr. 53.

Looking at the small value of the matter in dispute, and the other circumstances of the case, we must decline to open the litigation on the points to which the defendant's rule is directed.

The defendant's rule must therefore be discharged.

Then as to the plaintiff's rule. It raises for decision a point of some importance, if not novelty, in this country.

It is the right of every man to erect what buildings he pleases on his own land, as it is his right to take possession of his own land when he pleases, but both of these rights may by the law be impaired, if not lost, by neglect for cer-

tain periods of time to assert them as against others whose interests will be affected by the assertion of them.

While the Ontario Legislature in its wisdom, to some extent following the legislation of the mother country, 37 & 38 Vic., ch. 57, has shortened the period for the acquirement of title by possession of land, it has so far, we think, wisely abstained from extending the experiment to easements.

The law which provides that a man by the exercise of rights on his own land shall thereby in the course of time acquire right over the land of another, is not a law to be favoured in a new country where population is not so dense as in the older countries of Europe, and where the rapid growth of cities, towns and villages is without a parallel in Europe.

In the neighboring States of New York, Massachusetts, Maine, Connecticut, Maryland, Pennsylvania, and South Carolina, which are supposed to have derived their laws from the law of England, the doctrine of gaining a prescriptive right to light by mere length of enjoyment has been abandoned as being unsuited to the wants and circumstances of the country. See *Washburn* on Easements, 498. See further, *Powell v. Simons*, 13 Am. 629; *Guest v. Regnald*, 18 Am. 570; *Doyle v. Lord*, 21 Am. 629.

The law as now understood in England, is so peculiar in its provisions respecting light, that in considering a question of any novelty relating to it, little assistance can be derived from analogies that might be furnished by the laws of other countries. There is no other known system of law by which the remedy of the owner of land for an invasion of its privacy by his neighbour opening new windows upon it is confined to their obstruction. It is certain that by the law of England, the only mode by which the owner of land can prevent his neighbour from acquiring the right to light through windows looking upon it is by exercising his own right of building upon his own land so as to obstruct them. His omission to do so for twenty years gives to his neighbour a right to the light

over his land, and deprives himself of the right to interfere by building or otherwise upon his own land, with that state of things to which he is thus taken conclusively to have assented. See per Keating, J., in *Jones v. Tapling*, 11 C. B. N. S. 308.

Although such an easement is highly prized, and much contested in England, it is either not so much esteemed or so much needed, and certainly is not so much contested in our country as in the mother country.

The Legislature of England, as long since as 2 & 3, Wm. IV., ch. 71, gave the right a positive recognition, and placed it as far as possible on an absolute footing.

Our Legislature have adopted the English enactment, and whether expedient or not, it is now for all purposes a part of our statute law.

Consol. Stat. U. C. ch. 88, sec. 38, which is a transcript of the English statute, 2 & 3, Wm. IV, ch. 71, sec. 3, reads as follows: "When the access and use of light to or for any dwelling house, work-shop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

It has been held that personal occupation of the dwelling house, workshop, or other building by the owner, or by any body else, is not necessary to give the absolute and indefeasible right at the end of the twenty years. *Court-auld v. Legh*, L. R. 4 Ex. 126.

It has also been held that payment of rent by the owner for the privilege during the twenty years is not enough to constitute an interruption of the enjoyment during the period of twenty years. *The Plasterers' Company v. The Parish Clerks' Company*, 6 Ex. 630.

The only remedy, therefore, of the adjoining land owner is within the twenty years to make himself disagreeable to his neighbour by insisting upon a "deed or writing,"

under the statute, or make himself still more disagreeable by building on his own land, whether the building be needed for his own use or not, so as to obstruct the windows of his right-to-light-acquiring neighbour.

The law on the point was well expressed by Littledale, J., in *Moore v. Rawson*, 3 B. & C. 332, 340, decided in the year 1824.

He said: "Every man on his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He therefore, begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building, the owner of the adjoining land may afterwards within twenty years build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the right for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, *so long as he shall continue the specific mode of enjoyment which he had been used to have during that period.*"

So long as the foundation of the right was taken to be an implied license the Courts seemed to hold that any material alteration in the mode of enjoyment even after the expiration of the twenty years, was an abandonment of the right, but in *Jones v. Tapling*, 11 H. L. 290, the House of Lords unanimously held that, as under the statute, the right after twenty years is "absolute and indefeasible;" it cannot be lost to the extent that it has been acquired by a mere alteration of the mode of enjoyment, such as the substitution of a large for a small window, or the making of an additional window or windows.

The House of Lords, notwithstanding several decisions to the contrary, in effect, held that the right when once absolute and indefeasible cannot be lost or defeated by subsequent temporary intermission of enjoyment not amounting to abandonment.

Courts of Equity, while accepting the law as laid down, have not been uniform in their administration of it.

In some of the cases it is said that where the owner of the ancient light so deals with it as to alter the mode of enjoyment, although he may, at law, be entitled to damages, equity will not, by reason of his conduct, assist him: *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421; *Heath v. Bucknall*, L. R. 8 Eq. 1.

But the better opinion appears to be, that where there is a material injury to that which is a clear legal right, and it appears that damages from the nature of the case would not be a complete compensation, an injunction will be granted without reference to any such distinction as attempted in the foregoing cases: *Jackson v. the Duke of Newcastle*, 3 DeG. J. & S. 275; *Yates v. Jack*, L. R. 1 Ch. 295; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238; *Staight v. Burn*, L. R. 5 Ch. 163; *Aynsley v. Glover*, L. R. 18 Eq. 544, L. R. 10 Ch. 283. See further, *Kino v. Rudkin*, L. R. 6 Ch. D. 160.

It may therefore be taken as clear law, that a man having got the right to the entry of light into a window of a certain size, does not, by making the window larger, lose his remedy either at law or in equity, for the obstruction of so much of the window as represents the ancient light.

The question still remains, whether an alteration in the mode of enjoyment during the statutable period is such an "actual enjoyment" for twenty years, as the statute requires.

On this point decided cases throw very little light, for they are cases where the alteration was made after the expiration of the statutable period.

But as an examination of them may assist in the understanding of the question, we shall briefly notice them.

In *Cotterell v. Griffiths*, 4 Esp. 69, Lord Kenyon held that where the plaintiff was entitled to light by means of blinds fronting a garden, which blinds he afterwards removed and opened an uninterrupted view into the garden, that the owner of the garden was not justified in obstructing the light in the new mode of enjoyment.

In *Martin v. Goble*, 1 Camp. 320, Chief Baron McDonald held that the conversion of a malt house into a dwelling house, did not entitle the owner of the latter to more light than he had acquired for the malt house, but it was intimated that the change did not deprive him of the use of as much light as he had acquired by means of the malt house.

In *Chandler v. Thompson*, 3 Camp. 80, it was held, in the case of the enlargement of an ancient window, that so much of the new window as constituted the enlargement might be lawfully obstructed, but that the plaintiff was entitled to the free admission of light through the remainder of the window, without reference to what he might derive from other sources.

In *Garritt v. Sharp*, 3 A. & E. 225, after the alteration of a barn into a malt house, it was held that evidence to shew that thereby the mode of enjoyment was essentially altered by the owner of the dominant tenement to the inconvenience of the servient tenement, was improperly rejected.

In *Blanchard v. Bridges*, 4 A. & E. 176, where the owner of a house enlarged it, and inserted a window at one end in the part added, and at another carried out the sidewalls between which two windows formerly stood in a straight line five feet, converting this into a bow, and inserting two bow windows in the same direction but not in the same situation as the two former windows, it was held that whatever privilege against the obstruction of light the windows of the original house possessed, this privilege did not apply to the three new windows.

In delivering judgment Patteson, J., at p. 191, said: "The consent cannot fairly be extended beyond the access of light and air through the same aperture (or one of the

same dimensions, and in the same position), which existed at the time when such consent is supposed to have been given."

In *Renshaw v. Bean*, 18 Q. B. 112, where the plaintiff's premises had been re-built about eighteen or nineteen years before the re-building of the defendant's premises, and none of the identical windows in respect of which the action was brought had existed for twenty years before the obstruction complained of, the Court held that no action would lie for the obstruction, not however on the ground that the plaintiff by the alteration in the windows had lost the right which he had before enjoyed, but that having put himself in such a position that the excess of light could not be obstructed without obstructing the portion before the alteration occupied by the ancient lights, the plaintiff had only himself to blame for such a state of things, and was without remedy.

In *Wilson v. Townend*, 6 Jur. N. S. 1109, Kindersley, V. C., looked upon the decision in the last case as inconsistent with *Chandler v. Thompson*, 3 Camp. 80, already noticed; but in *Cooper v. Hubbuck*, 7 Jur. N. S. 457, Sir John Romilly thought the two cases consistent.

In the last mentioned case, *Cooper v. Hubbuck*, it was held that a person who has the right to light over the land of another cannot alter the size or position of his windows so as *materially* to prejudice the neighbouring owner over whose land he has the easement.

In *Hutchinson v. Copestake*, 8 C. B. N. S. 102, affirmed 9 C. B. N. S. 863; *Renshaw v. Bean*, 18 Q. B. 112, was simply followed.

In *Jones v. Taping*, 11 C. B. N. S. 283, the plaintiff, in order to get rid of the effect of the decision in *Renshaw v. Bean*, 18 Q. B. 112, before action altered his new windows to the size and position of his old windows, and was held, notwithstanding much differences of opinion among the Judges, entitled to recover for the continuance of an obstruction to his lights, although erected by the owner of the adjoining land before the last alteration in the windows.

This decision was affirmed. The case as reported in 12 C. B. N. S. 826, is chiefly noticeable for the great variety of opinions expressed by the Judges who decided it. Bramwell, B., and Blackburn, J., held that the original obstruction was not justifiable, and so controverted the principle laid down in *Renshaw v. Bean*, 18 Q. B. 112. Wightman, J., and Crompton, J., held, that the original obstruction was justifiable, but that the defendant was bound to remove it upon the abandonment by the plaintiff of the usurped rights. Pollock, C. B., and Martin, B., held that the obstruction was lawful at the time of its erection, and its continuance was not, under the circumstances, unlawful.

When the case was carried to the House of Lords, there were still great differences of opinion among the Judges, whose opinions were asked by the House, but the law Lords unanimously held, that when the right to light is acquired under the statute, to the extent that it is acquired it is not to be lost by a mere attempt to extend the right.

Lord Chelmsford in delivering judgment, said, at p. 332: "While the user is ripening into a right, the adjoining owner has the power completely in his own hands. If he has no objection to the *particular* window, but is desirous of preventing any *enlargement* or *alteration* of it or any *new* windows being opened, he may inform his neighbour of his determination to build up against the window unless he will enter into an agreement not to enlarge or alter it, nor to open any new one without his permission."

It is not necessary in this case to decide whether there may be an actual enjoyment of light through a window or aperture for twenty years, where some portion of the window or aperture has, notwithstanding alteration of the window or of the building in which situate, always remained in the same position, for we are of the clear opinion that where the alteration, instead of being a mere addition to the existing window, is so great as to amount to a closing up of the old and substituting another window for it in a

different part of the house, there cannot be held to be the actual enjoyment in any one place which the statute requires in order to ripen into an absolute and indefeasible right.

What appears in such a case is the enjoyment of light for a portion of the twenty years in one part of the house, and the enjoyment of light for another portion of the twenty years in a different part of the house, but no actual enjoyment for twenty years in any one part of the house.

Not one of the defendant's windows was more than three feet in height. The raising of his house for more than three feet in height during the statutable period of twenty years, has so changed the course of the light, that none of it can be said for twenty years to have passed through the same aperture, or one in the same position for twenty years.

The plaintiff's rule must be made absolute to enter a verdict in his favour on all the issues on the record, and \$15 damages.

WILSON, J., concurred.

MORRISON, J., having been appointed Judge of the Court of Appeal, took no part in the judgment.

Defendant's rule discharged.

Plaintiff's rule absolute to enter a verdict for \$15.

RE LAKE.

Certiorari—Notice of motion—Affidavit of service—Waiver.

The affidavit of service of notice of motion for a *certiorari* to remove a conviction, must identify the magistrates served as the convicting magistrates. But an affidavit defective in this respect was allowed to be amended, the time for moving for the *certiorari* not having expired. Such an objection was held not to be waived by the attorney having accepted service for the convicting justices, and undertaken to shew cause.

The notice need not be served on the private prosecutor.

NOVEMBER 28, 1877. *Ferguson*, Q. C., moved, on notice to William Thomas Yarwood and Robert Addison Norman, Esquires, two of Her Majesty's Justices of the Peace in and for the county of Prince Edward, for a writ of *certiorari* to remove into this Court a conviction made by the said William Thomas Yarwood and Robert Addison Norman, as such justices, on or about the 10th August, 1877, whereby Lake was convicted, for that he, on the 31st July last past, at the town of Picton, &c., in the premises occupied by him, did sell intoxicating liquor, to wit, &c., without the license required therefor, and being a violation of 37 Vic. ch. 32, sec. 24, O., and was adjudged to pay the sum of \$20 penalty and \$9 costs forthwith thereafter, in default whereof distress was ordered, and in default of distress imprisonment at hard labour for 15 days, unless said sums were sooner paid.

The notice was dated 14th day of November, 1877. The affidavit of service of this notice made by John A. Wright, stated, "That I did, on the 14th day of November instant, personally serve William Thomas Yarwood and Robert Addison Norman, two of Her Majesty's Justices of the Peace in and for the county of Prince Edward, each with a true copy of the notice hereto attached, marked A, by delivery to and leaving with the said William Thomas Yarwood and Robert Addison Norman copies of the said notice at the town of Picton, in the county of Prince Edward." Sworn the 14th November.

J. G. Scott, Q. C., objected that the affidavit did not identify the magistrates served as the convicting magistrates, and contended that for this cause the motion must fail. He cited *Regina v. Inhabitants of Gilberdike*, 5 Q. B. 207; *Regina v. Inhabitants of Darton*, 2 D. & L. 492; *Regina v. Inhabitants of Cartworth*, 5 Q. B. 201.

December 6, 1877. WILSON, J.—The cases referred to by Mr. Scott shew that the affidavit of service of notice of the intention to move for a rule to remove a conviction made by justices of the peace, should shew that the service was made upon the justices who made the conviction. And in the *Queen v. Inhabitants of Gilberdike*, 5 Q. B. 207, an affidavit objectionable in that respect was not allowed to be made good by another affidavit rectifying the omission, after a lapse of six months after the making of the order of sessions, Lord Denman, C. J., saying: "If the six calendar months (Stat. 13 Geo. ii. ch. 18, sec. 5), had not elapsed, the case might be different; but here the fact of notice to the proper justices is not brought before the Court till more than six months after the order of sessions." Here, the six months allowed by that statute, within which the writ may be sued out after the conviction made, has not yet elapsed. And I think it is not unreasonable to allow the applicant to amend his affidavit of service of the notice.

In this case it appears that the notice fully describes the particular justices who made the conviction, and Mr. Scott accepted service for them, and undertook to shew cause to the notice to avoid the expense of personal service upon them.

I think he may still shew for cause that the justices described in the notice are not shewn to be the justices who were served with the prior notice.

The applicant should be allowed to amend his affidavit of service against the defect objected to.

But this notice need not be served on the private prosecutor. He has nothing to do with this proceeding. If the writ be granted, the prosecutor will then be served with a

rule to shew cause why the conviction should not be quashed. It is that alone in and with which the prosecutor is interested.

HARRISON, C. J., concurred.

MORRISON, J., having been appointed to the Court of Appeal, took no part in the judgment.

Rule accordingly.

REGINA V. WILLIAM HAINES AND WILLIAM HENRY
WILLIAMS.

Criminal trial by C. C. Judge.

Held, that a County Court Judge trying a prisoner summarily under 32-33 Vic. ch. 35, D., has the same authority to convict of an offence under 32-33 Vic. ch. 21, sec. 110, D., instead of that charged, as a jury has.

CASE reserved under Consol. Stat. U. C. ch. 112, at the County Judge's Criminal Court, held at Walkerton, on the 6th and 8th November, 1877.

The indictment stated :

1. That the prisoners then in gaol stood charged for that they, the said W. H. Haines and W. H. Williams, on the 30th October, 1877, at the village of Paisley, did "unlawfully, fraudulently, and knowingly, by false pretences, obtain from Donald Kerr \$50 in money, with intent to defraud."

2. That the said prisoners, "by fraud, unlawful device, and ill practice in betting" on the possibility of opening a certain box, did unlawfully obtain from one Donald Kerr \$50, &c., "with intent to cheat" Donald Kerr.

3. That the prisoners did by "obtaining by false pretences, appropriate to their own use," the sum of \$50, the property of Donald Kerr.

4. That the prisoners "unlawfully, knowingly, fraudu-

lently and deceitfully, did conspire and agree together to obtain * * by divers false pretences * * from Donald Kerr, large sums of money * * to cheat and defraud him thereof.

The case stated that the prisoners, being asked, elected to be tried forthwith without a jury.

The prisoners were then tried. The evidence of Donald Kerr shewed that he had come to Paisley to sell, and had sold some oxen on a day when cattle buyers had collected there, and met prisoner Haines. They had some conversation about Kerr selling a colt to Haines, and it was arranged that Haines was to go home with Kerr and see it. They drank together, and then met the prisoner Williams. Williams asked Haines for tobacco, and Haines handed him a box, saying, "plenty of tobacco there." Williams said he would "bet fifty dollars the box could not be opened without taking a screw nail out." Haines asked Kerr to step aside, and when he had done so, asked the loan of \$50 for a few minutes, which Kerr loaned to him. Williams immediately slipped the money out of Haines hands, and went away with it. Kerr asked Haines for the money, and the latter said, "Come in to the hotel and I will give you a cheque." This Haines did give, telling Kerr it was on a bank thirty miles away. On cross-examination, Kerr said he placed confidence in Haines, because he thought he was coming out to buy his colt, and he also could not say positively that Haines did not put the money in his own pocket, but at any rate Haines said he lost it. He thought Haines wanted the money only a few minutes.

H. Reid, a constable, who arrested the prisoners, stated that they offered the money back to Kerr if they could get the cheque, and get off, and Kerr handed the cheque to Haines, who began to tear it in two, when the constable took it from them. They gave up the money to the committing magistrate.

Other evidence was given to the same effect.

The County Attorney who prosecuted, admitted there was no evidence to sustain the fourth charge.

The learned County Judge expressed the opinion that there was not sufficient evidence to support any of the charges as laid, and further, that from Kerr's evidence, and the stupid way in which he gave it, he did not think a charge of larceny could be sustained, (Kerr having said he loaned the money), but "being of opinion that the prisoners might, on the evidence, be properly convicted under 32-33 Vic. ch. 21, sec. 110, D., and that I had the same power as a jury under that section * * I endorsed my finding on the accusation in the following words :—I find that the prisoners, with intent to defraud, by pretending that they were betting, got possession of the money of one Donald Kerr, and with like intent applied the same to their own use ; and I accordingly convict them under 32-33 Vic. ch. 21, sec. 110, D."

He then sentenced the prisoners to six months in the Central Prison.

Mr. Shaw, counsel for the prisoners, not being in Court at the time, was subsequently heard on the question whether under the section in question the Judge had the same power as a jury, and the County Attorney replied, the execution of the judgment being meanwhile respited ; and the Judge finally reserved the case for this Court.

During this term, Monday, December 3, 1877, the case was argued.

Hardy, Q. C., for the Crown. *Cornwall v. The Queen*, 33 U. C. R. 106, governs this case. When a prisoners submits to be tried for the greater offence, he consents to be tried for the lesser.

H. J. Scott, contra. The original charges were read over to the prisoners, and they consented to be tried without a jury and summarily for those charges, and those only. The Judge found them not guilty as to the original charges, and should have acquitted them. He cited *Looker v. Halcomb*, 4 Bing. 183.

December 28, 1877. WILSON, J.—We are of opinion the learned Judge had the like authority to find the defendants guilty of an offence under 32–33 Vic., ch. 21, sec. 110 D. upon the accusation in this case, in like manner as a jury could have done.

But we are of opinion the offence proved was a larceny and not a false pretence, though that question is not before us.

The learned Judge did not advert to the distinction there is between the *possession* merely being gained by fraud and the *property* as well as the possession being parted with by fraud: *Regina v. McKale*, L. R. 1 C. C. 125; *Regina v. Prince*, *ib.* 150.

The judgment will therefore be affirmed.

HARRISON, C. J., concurred.

MORRISON, J., was not present at the argument, and took no part in the judgment.

Judgment affirmed.

BURGESS V. BANK OF MONTREAL.

Tax sale—Certificate—Description of land sold.

The sheriff, on a sale of land for taxes in 1860, under C. S. U. C. ch. 55, gave to the purchaser a certificate describing the land sold as "five acres of land, to be taken from the south-west corner of the south-west quarter of lot 3 in the 11th concession of the township of East Zorra." Six years afterwards, the successor of this sheriff gave a deed describing the land particularly by metes and bounds.

Held, that the sale was invalid; for although a certificate was not necessary, yet when given the land must be properly described in it, and must be the same land afterwards conveyed; and here the description was so uncertain that it was not apparent whether it was the same land described in the deed or not.

Held, also, that this was not a defect cured by the 29-30 Vic. ch. 53, s. 156, or 32 Vic. ch. 36, sec. 155.

ACTION on a covenant contained in an indenture made by the defendants to Henry Curtis, dated the 1st of November, 1864, by which certain lands were conveyed with covenants for title. Curtis conveyed to St. Germain, and he to the plaintiff.

The breach of covenant was, that a certain part of the land (describing it by metes and bounds as in the sheriff's deed hereinafter given) was, in the year 1860, sold by the sheriff for arrears of taxes.

The plea on which the defendants relied, and upon which issue was joined, was, that the land, which was so particularly described in the declaration by metes and bounds, containing five acres of lot 3 in the 11th concession of East Zorra, had not been sold by the sheriff as alleged.

The cause was tried at the Chancery sittings held last Fall at Woodstock, before Blake, V. C., without a jury, who found a verdict for the plaintiff and damages \$762.46.

The evidence shewed that the certificate of sale, dated 9th October, 1860, which sheriff Carroll delivered to the tax purchaser, described the land which was sold as "five acres of land, to be taken from the south-west corner of the south-west quarter of lot 3 in the 11th concession of the township of East Zorra," sold for taxes, &c.

Sheriff Carroll, who sold the land and gave the certificate, died without giving a deed, and the deed in dispute was given by his successor, and was dated September 17, 1866.

The description of the land given by metes and bounds in the sheriff's deed, was—

“Commencing at the south-west angle of said lot, thence northerly, following the westerly limit of said lot, 7 chains and 8 links; then easterly, parallel with the northerly limit of said lot, 7 chains and 8 links; then southerly, parallel with the westerly limit of said lot, 7 chains and 8 links to the southerly limit of said lot; then westerly, following the southerly limit of said lot, 7 chains and 8 links, to place of beginning, containing five acres.”

The sheriff's sale book described the land as “five acres from south-west corner.”

During this term, November 23, 1877, *Becher*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict entered for him should not be set aside, and a verdict entered for the defendants, or for a new trial on the grounds set forth in the rule.

During the same term, November 29, 30, 1877, *Bethune*, Q. C., shewed cause. The objection relied upon by the defendants is, that the land which was sold for arrears of taxes was not sufficiently described or identified at the time of the sale, or in the certificate which was given by the sheriff to the tax purchaser after the sale. The sheriff's book shews the taxes were due upon the south-west quarter of lot 3 in the 11th concession of East Zorra, 50 acres, and that the description of the land sold is “five acres from south-west corner,” and that R. H. Carroll was the purchaser. The certificate of sale which was given by the sheriff, dated the 9th of October, 1860, the day of the sale, represented that Reuben H. Carroll “has become the purchaser of five acres of land to be taken from the south-west corner of the south-west quarter of lot 3 in the 11th concession of the township of East Zorra.” The land was afterwards fully and properly described by the sheriff in

the deed which he made, as successor of the sheriff who made the sale, dated 17th September, 1866. He referred to Consol. Stat. U. C. ch. 55, sec. 140, and contended that the sale of five acres of land, to be taken from the south-west corner of the lot, was a valid sale; but that if it were not sufficiently certain, it was one of those defects which were cured by the late legislation: 32 Vic. ch. 36, sec. 155: *Knaggs v. Ledyard*, 12 Grant 320; *Mills v. McKay*, 15 Grant 192; *Hutchinson v. Collier*, 27 C. P. 249; *Carroll v. Burgess*, 40 U. C. R. 381.

Becher, Q. C., supported the rule. The description of the land sold, "five acres from the south-west corner" of the lot, was uncertain and absurd. How was it to be known or laid out? Five acres could not be taken out of the corner or from the corner of the lot. The corner of a lot was an angle. If five acres were to be taken from it, were they to be laid out in the form of a triangle? Was the angle at the corner to be a right angle corresponding with the sides of the lot, or a lesser angle? and if a lesser angle, at what angle was it to be? or were the five acres to be laid out in a square or a parallelogram, or in what other sort of figure or shape? It is impossible a sale by such a description can be good, simply because it is a sale of nothing definite, and which no subsequent action can make definite, and which nobody can understand. The description about six years afterwards given of five acres of the lot by the sheriff, upon a description drawn by a surveyor by metes and bounds and distances, cannot apply to the five acres which were pretended to be sold, because the latter description is the surveyor's statement only of what measurements and bounds will make five acres; and it cannot be shewn to be the description of the five acres which the sheriff pretended to sell. Besides, the sheriff who sold had died before the deed was given, and his successor knew nothing about the five acres which his predecessor had sold, excepting from the entry in his book, and that was that five acres of the lot had been sold from the south-west corner, which is so insensible and indefinite that

it cannot be acted upon. There is no statute which applies to such a case as this. He referred to Consol. Stat. U. C. ch. 55, secs. 137, 140, 141; 33 Vic. ch. 23, sec. 13; *McDonell v. McDonald*, 24 U. C. R. 74.

December 28, 1877. WILSON, J.—There would have been no difficulty under the original enactment 6 Geo. IV. ch. 7, sec. 13, in laying out the five acres of this lot, which the sheriff sold, to be taken from the south-west corner, if that were the one from which the lots in the concession were numbered, because the statute prescribed in what manner the land sold should be laid out and described.

The obligation to sell the particular part of the lot as prescribed by the above Act, was altered by the 13-14 Vic. ch. 67, sec. 53: see also secs. 54-57.

That Act was repealed by the 16 Vic. ch. 182, and secs. 59, 60, and 65, were enacted in the place of the three sections mentioned in the Act of 1850.

The Consol. Stat. U. C. ch. 55, contains the above provisions in secs. 137, 140, 149, 150.

In my opinion it was not necessary the sheriff should, under these later acts, have declared either before or upon putting the lot up for sale whether he would sell the whole lot or less, because he could not tell what would be bid for, and of course in that case he would not describe it. Nor do I think he was obliged immediately after the sale to describe by metes and bounds the particular part he had sold, as that was impossible. He could not describe accurately which particular parcel he should convey under his sale as most for the benefit of the owner. Nor could he, at the time of sale, set out by metes and bounds the portion of every lot he had sold; that must of necessity have been left to some future day; and it would, I think, have been sufficient to do all that when he gave his certificate; but that matter has been expressly provided for since by the 32 Vic. ch. 36, sec. 138, and nothing in this case turns upon what took place at the sale, but only upon that which is contained in the certificate after the sale.

The Consol. Stat. U. C. ch. 55, sec. 140, provides that "The

sheriff, after selling any land for taxes, shall give a certificate under his hand to the purchaser, stating distinctly what part of the land and what interest therein have been so sold * * and describing the same, and also stating the quantity of the land," &c.

This certificate did not so describe the land—the only description was of "five acres to be taken from the southwest corner" of the lot, and it is the effect of that which has to be considered.

I do not think it was necessary the purchaser should have got a certificate at all, so as to secure to him the land he had bought, or his right to have a conveyance of it.

Section 140 says the certificate shall state in it that the purchaser will be entitled to a deed of the land on demand, at any time after the expiration of one year "from the date of the certificate," if the land be not previously redeemed. And section 141 enacts that on receipt of the sheriff's certificate of sale, the purchaser shall become the owner of the land, so far as to have all necessary rights of action, and power for protecting the same from spoliation, &c.

So that, although the ownership of the land bought would not have passed to the purchaser without the certificate, the sale to him was not avoided although no certificate was given. The sheriff was exercising a power, and his power was not exhausted or determined until he gave a deed of the land to the purchaser, which he could do at any time after the expiration of the year allowed for redemption.

The case of *Doe d. Hughes v. Jones*, 9 M. & W. 372, applies, if authority were wanting on that point.

There the sheriff sold a leasehold under a *fi. fa.* against goods, but he did not execute an assignment to the purchaser, and it was held that the legal estate still remained in the debtor, because the sheriff had not designated by an assignment the person who was to get the legal estate, and Alderson, B., said the sheriff may assign, as long as he has the power, to any one he likes. So that the purchaser there was not in law the legal owner of the land.

Then, sections 148 and 149 allow the owner of the land

only "one year from the day of *sale*, exclusive of that day," to redeem; and if the land be not redeemed within that period, "then, on demand of the purchaser, or his assigns, or other legal representatives, at any time afterwards, and on payment of one dollar, the sheriff shall execute and deliver to him, or them, a deed of sale of the land."

So that, if the owner whose land has been sold cannot redeem the land after one year from the day of sale, the purchaser of it must be entitled to it, although he received no certificate. His purchase is still good, and the power of the sheriff is still continuing. The certificate is a temporary title, not in my opinion essential to the due execution of the deed afterwards by the sheriff.

If I am right in my opinion that the sheriff was not, under the statute, bound to state at the sale distinctly what part of the lot he had sold, or proposed to sell, and to describe the same, and if I am right in saying that the sheriff's certificate was not an essential part of the transaction, excepting for the purpose mentioned in section 141, of constituting the purchaser the temporary and qualified owner of the land he had bought, for the year allowed for redemption, and until he should get his deed, and that the sheriff's power was not exhausted until he had made the deed to the purchaser then, is the sheriff bound by the description of the land contained in the certificate, which he gave to the purchaser in this case?

The sheriff must, I think, be bound by the description he has given in the certificate.

* The sheriff must certainly be so far bound that he cannot convey a different piece of land than that which he has certified as having sold to the purchaser, unless in the case perhaps of a mistake, which he must have the power to rectify according to the actual fact. Here it is not said that the sheriff has positively given a different parcel of land than that which he sold or certified for, but that he did not by his certificate identify the land he had sold, and so it cannot be said whether he has given a different

parcel of land in his deed or not; and there is no way of knowing whether the deed has been made for the same piece of land which was actually sold or not.

On the other hand, it may be said the certificate, though not certain, is sufficiently so to permit the sheriff in his deed to describe the land with more particularity than he has done in the certificate.

It may be asked, what piece of land was the purchaser to take possession of as the owner, and to maintain actions for in order to protect it from spoliation, under sec. 141, before he got his deed?

There are different ways of describing "five acres to be taken from the south-west corner." The purchaser might have been claiming a piece bounded by certain limits, while the sheriff might have said he did not mean to give him such a shaped piece, but a piece of a different form. I am not satisfied, however, that the sheriff, who was the proper person to decide that question, could not have cancelled that certificate and given a more accurate one, or have given a more accurate description when he executed the deed.

But the difficulty here is, that the sheriff who sold the land did not make the deed, and the deed was not made until six years after the sale. And it is not at all apparent that the sheriff who made the deed conveyed the same land which his predecessor had sold six years before it.

If this had been a transaction between private parties, the vendee could have made the contract valid by election: *Shep. Touch.*, 7th ed., 251. But the doctrine of election can have no place in a sale of this kind.

In the work last quoted it is said: "So if one grant me three acres of wood towards the north side of the wood, this is a good grant and certain enough," and the editor adds, "Being the land on the extreme part of the north side, or to be as circumstances may require rendered certain by election."

That passage is an authority for the sufficiency of this certificate. But the difference between a voluntary sale by, and one adverse to, the owner must be kept in mind.

I am of opinion in this case the sale and certificate in 1860 by one sheriff, and the description of the land and deed made in 1866 by a different sheriff, which deed may be the same land which was sold, but is not necessarily so, and cannot be affirmed to be so, is not a defect or matter which is cured or protected by the 29-30 Vic. ch. 53, sec. 156, or the 32 Vic. ch. 36, sec. 155, O., because by these acts the deed given must be of the same land which was sold.

If the deed had been made by the same sheriff who sold the land, more might have been said perhaps in favour of the deed than can be said of it when it has been made by a different sheriff. But I do not say that it could be contended successfully, for I feel a difficulty in saying that what was sold was a square 7 chains .08 links on the sides, as described in this deed, any more than I can say it was not a parallelogram of 5 chains x 10 chains.

Although, therefore, of opinion that a certificate was not necessary to be given, and that the first full description of the land sold might have been given in the deed, I yet think that when the certificate was given the land described in it must be taken to be the land which was sold or intended to be sold; and if it is not properly described, that, although a deed is given of it, the 32 Vic. ch. 36, sec. 155, is not a protection to the *purchaser*. That statute only applies when *the same* land which was sold was that which was conveyed. I thought that some provision of the Act upon the argument would be found to apply; but I think this case is not provided for.

The result must therefore be, that the rule will be made absolute to enter a verdict for the defendants.

HARRISON, C. J., concurred.

MORRISON, J., having been appointed to the Court of Appeal, took no part in the judgment.

Rule absolute.

REGINA V. SUTTON AND DUNCAN.

37 Vic. ch. 32, O.—*Keeping liquor for sale without license—Joint conviction and penalty—Amendment.*

A conviction of S. & D., under 37 Vic. ch. 32, O., as amended, for that they, trading under the name and firm of S. & D., in their house of public entertainment, did unlawfully keep liquor for the purpose of sale, barter, and traffic therein, without the license by law required, and adjudging them for their said offence to pay \$40, and costs :

Held, bad, for that the defendants could not be jointly convicted, nor one penalty awarded against them jointly.

Held, also, that such conviction could not be amended.

NOVEMBER 16, 1877. *W. A. Foster* obtained a rule *nisi* calling on the police magistrate of Owen Sound, and one Pearce, liquor inspector, to shew cause why a conviction dated the 21st of August, 1877, made by the police magistrate, whereby he convicted Sutton and Duncan for having unlawfully kept liquor for the purposes of sale and barter and traffic without the license therefor by law required, and whereby he adjudged Sutton and Duncan to pay a fine of \$40 for the alleged offence, should not be quashed, on the grounds : 1. The said conviction imposes a penalty of \$40 upon each of the said defendants, and there is nothing to shew why or for what offence they are liable to such a penalty, and the conviction is bad for imposing a first penalty in that sum. 2. It being shewn by the evidence before the said magistrate that the Temperance Act of 1864 is in force in the town of Owen Sound, where the offence stated in the said conviction is alleged to have been committed, the said conviction discloses in fact no offence, as no license to sell spirituous liquors by retail could be granted to or held by the defendants. 3. It does not appear from the conviction that the defendants were not the holders of such a license as legally entitled them to keep the liquor therein mentioned for sale in the said town of Owen Sound, the said Temperance Act being in force there—in other words, it is not shewn that the said liquors were not kept for sale under a wholesale license. 4. The conviction does not shew that the defendants in fact had or kept for sale, barter,

or traffic, spirituous liquors at all, nor that they were not kept for exclusively medicinal or sacramental purposes. 6. The said police magistrate had no jurisdiction, the Temperance Act of 1864 being in force as aforesaid, to convict the defendants of the alleged offence, and 40 Vic. ch. 18, sec. 30, O., in so far as it attempts to confer jurisdiction in such case is unconstitutional and void ; but even if it is not, the mere keeping and having liquors for sale is no longer an offence.

It appeared that the Temperance Act of 1864 was in force at the time of the conviction and offence in the county of Grey.

The information, &c., was returned to this Court under a writ of *certiorari* and filed.

The information stated the offence to be that "Elisha Sutton and Archibald Duncan, trading under the name of Sutton & Duncan, on the 4th day of August, A. D. 1877, at the town of Owen Sound, in the county of Grey, unlawfully did keep liquor for sale, barter, and traffic there, without the license therefor by law required."

The evidence before the Police Magistrate plainly shewed that whiskey and beer were kept by defendants with a bar, and means for serving the liquors.

For the defence it was contended that the Dunkin Act superseded the Crooks' Act or Act of 1874, and that no conviction could be had under the latter Act.

The conviction was dated 21st August, 1877, and stated "that Elisha Sutton and Archibald Duncan, trading under the name and firm of Sutton & Duncan, are convicted before * * for that they the said * * (S. & D.) on the 4th of August, 1877, at * * in their house of public entertainment, known as the City Hotel, did unlawfully keep liquor for the purpose of sale, barter, and traffic therein, without the license by law required * * and I adjudge the said Elisha Sutton and Archibald Duncan for their said offence to forfeit and pay the sum of forty dollars, to be paid and applied according to law, and also to pay to the said * * (informant) the sum \$3.60 for his costs in this behalf ; and if the said several sums be not

paid forthwith, then I order the said sums to be levied by distress and sale of the goods and chattels of the said Elisha Sutton and Archibald Duncan."

December 6, 1877. *J. G. Scott*, Q. C., shewed cause. [The greater part of the argument turned on the question whether there could be a conviction under the Tavern and Shop License Act, 37 Vic. ch. 32, O., in a place where the Temperance Act of 1864 was in force, but as the judgment does not turn on that point, the argument respecting it is not reported.] As to the formal objection, that the penalty and conviction are joint and not several, the conviction follows the statute. The statute also authorizes \$20 to \$50 penalty, and so the conviction may be read as for \$40 each. He referred to *Rex v. Clark*, 2 Cowp. 610; *Oke's* Magisterial Synopsis, 10th ed., vol. i., 151; *Regina v. Strachan*, 20 C. P. 182.

Oslor, contra. The conviction is bad for the objections taken, and cannot be amended, as the Court cannot say what was intended to be imposed as a fine. He referred to *Burn's* Justice, vol. i., 1154, title "Conviction"; *Rex v. Bleasdale*, 4 T. R. 809; *Martin v. Pridgeon*, 1 E. & E. 778; *Morgan v. Brown*, 4 A. & E. 515; *Regina v. Dean*, 12 M. & W. 39.

December 28, 1877. ARMOUR, J.—This is an application to quash a conviction brought before us on *certiorari*. The information upon which the conviction is founded, and the conviction, are respectively as follows. (Here his Lordship read the information and conviction set out *ante* p. 221.)

Two of the several objections to the legality of this conviction are in effect that the defendants could not be *jointly* convicted of the offence charged, and that the award of one penalty against them *jointly* is erroneous. I am of opinion that both these objections are well founded, and that the conviction is bad on both grounds.

This is a conviction for a violation of 37 Vic. ch. 32, sec. 25, which provides that "No person shall keep or have in

any house, building, shop, eating house, saloon, or house of public entertainment, or in any room, or place whatsoever, any spirituous, fermented, or other manufactured liquors for the purpose of selling, bartering, or trading therein, *unless duly licensed thereto under the provisions of this Act;*” and is made under 37 Vic. ch. 32, sec. 35, as amended by 39 Vic. ch. 26, sec. 20, and again amended by 40 Vic. ch. 18, sec. 16, which is as follows: “Any person who shall sell or barter spirituous, fermented, or manufactured liquors of any kind *without the license therefor by law required*, or who shall otherwise violate any other provision of this Act, in respect of which violation no other punishment is prescribed, shall, for the first offence, on conviction thereof, forfeit and pay a penalty of not less than \$20 besides costs, and not more than \$50 besides costs; and for the second offence, on conviction thereof, such person shall be imprisoned in the county gaol of the county in which the offence was committed, to be kept at hard labour for a period not exceeding three calendar months; and for a third and any after offence, on conviction thereof, such person shall be imprisoned in the county gaol of the county in which the offence was committed, to be kept at hard labour for a period of not less than one, nor more than three calendar months. The number of such previous convictions shall be provable by the production of a certificate under the hand of the convicting justice, or of the clerk of the peace, without proof of his signature or official character, or by other satisfactory evidence.”

It is laid down in *Hawkins's Book*, 2, ch. 25, sec. 89, that “where the offence indicted doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offence, as the following a joint trade without having served a seven years' apprenticeship required by the statute, in which case it must be the particular defect of each trader which must make him guilty, and one of them may offend against the statute, and the others not, the indictment or information

must charge them severally and not jointly, for it is absurd to charge them jointly; because the offence of each defendant arises from a defect peculiar to himself."

The law is laid down in the same way in all the text books which treat of the subject. The offence of the defendants in this case does not wholly arise from their *joint* act, if it is a *joint* act, but from the personal and particular defect or omission in each defendant of not being duly licensed: 2 *Roll. Abr.* 81; *Rex v. Weston*, 1 *Strange* 623; *Rex v. Tucker*, 4 *Burr.* 2046.

The offence charged thus being a separate offence in each defendant, and an offence of which they could not be jointly convicted, two offences have been charged in the information, which is expressly prohibited by 32-33 Vic. ch. 31, sec. 25, which provides, among other things, that "every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences."

But apart altogether from the fact of the criminality of the offence charged arising from the personal disqualification of each defendant to do, an act not in itself otherwise lawful without being duly licensed, the offence charged is several in its nature, and the award of one penalty against the defendants jointly is erroneous.

In *Hawkins's* Book 2, ch. 48, sec. 18, it is laid down "That where there are several defendants a joint award of one fine against them all is erroneous, for it ought to be several against each defendant; otherwise one who hath paid his proportionable part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another."

In *Rex v. Clark*, 2 *Cowp.* 610, which was an information against three persons for obstructing certain custom house officers, contrary to 8 Geo. I., ch. 18, sec. 25, claiming that the defendants had thereby severally forfeited the sum of £40, the jury found the defendants severally guilty, and it was held that each defendant was liable to the penalty.

Lord Mansfield in giving judgment, says, p. 612: "Where the *offence* is in its *nature single*, and cannot be severed, there the *penalty* shall be only *single*; because, though several persons may join in committing it, it still constitutes but *one* offence. But where the offence is in its nature *several*, and where *every* person concerned may be *separately* guilty of it, there each defendant is separately liable to the penalty, because the crime of each is distinct from the offence of the others, and each is punishable for his own crime."

In *Morgan v. Brown*, 4 A. & E. 515, it was held that the imposition of a joint penalty upon two defendants for an assault was bad, and Littledale, J., says, p. 519: "The general result of the authorities cited in *Hawkins*, I think, is, that where a fine is imposed upon several defendants, it should be imposed upon them separately."

In *Regina v. Dean*, 12 M. & W. 39, the defendant and his partner having been separately convicted of the same offences under 3 & 4 Wm. IV., ch. 53, sec. 44, which enacts that "every person" who shall be concerned in the unshipping of goods, the duties for which have not been paid, &c., shall forfeit either the treble value thereof, or be liable to the penalty of £100, it was held that each was liable to the penalties imposed by the Act.

In *Regina v. Cridland*, 7 E. & B. 853, a conviction of four defendants for trespass in pursuit of game was adjudged bad, and quashed, because it adjudged each defendant to be imprisoned for one month unless the costs and charges of conveying all to gaol should be sooner paid. And in that case Crompton, J., says, p. 870: "I wish it to be understood that I do not agree to the proposition that, consistently with section 10 of 11 & 12 Vic. ch. 43," (similar to section 25 of 32-33 Vic. ch. 31, D., above referred to), "several defendants can be convicted in one conviction on one information for an offence which is separate in its nature, and which is therefore a separate offence by each of them."

In *Regina v. Littlechild*, L. R. 6 Q. B. 293, an application
29—VOL. XLII U.C.R.

was made to quash a conviction under 1 & 2 Wm. IV., ch. 32, sec. 3, which provides that "if any person whatsoever shall kill or take any game, or use any dog, gun, &c., for the purpose of killing or taking any game on a Sunday * * such person shall, on conviction, forfeit for every such offence a penalty not exceeding £5." The information charged the defendant and one Heslip with having on a certain Sunday unlawfully used a gun for the purpose of killing game, and the justices convicted each of them separately by a separate conviction, and adjudged each to pay the sum of £3 and costs.

Mellor, J., in giving judgment says, p. 295: "I am of opinion that upon the facts stated in the case, the judgment of the Quarter Sessions affirming the convictions is right. *Rex v. Clark*, 2 Cowp. 610, governs this case. In the present case the information was jointly against the two offenders; they were separately convicted in separate convictions. It is clear that the penalty is imposed on each person, and it would have been wrong to have convicted them jointly. It never could be intended that one of the offenders should pay the whole aggregate of the two penalties, or go to prison until the other had paid his share. I think that the convictions were quite right." I refer also to the case of *Rex v. Hube*, 5 T. R. 542, and *Regina v. Snider*, 23 C. P. 330.

Then the question arises, can this conviction be amended? If I am right in the conclusions I have drawn on the grounds of objection to its validity, I do not see how we can possibly amend it.

In *Regina v. Cridland*, already referred to, Erle, J., says, p. 869: "The conviction might be amended by guessing that the justices could not have intended any such consequence," [as that one defendant should be imprisoned for one month, unless the costs and charges of conveying all to gaol should be sooner paid) "but the power of amendment is discretionary, and, I think, ought not to be exercised in this case." And Crompton, J., says, p. 871: "It is said that the Court can amend. But it seems to me that we cannot guess what was the intention of the justices. They may have intended

to order precisely what they have expressed. If they did they were clearly wrong."

I think the police magistrate, in making the conviction now before us, did precisely what he intended to do—convicted the defendants jointly, and imposed the penalty upon them jointly,—and I think that he was clearly wrong in doing either. Can we now amend by drawing up separate informations, if that is, as I think it was, necessary. Can we amend by drawing up two separate convictions, which I think clearly necessary. Can we divide the penalty, and impose half upon each defendant, or can we impose the whole penalty on each. Can we divide the costs, and impose half on each, or can we impose the whole costs on each; if the latter we would impose more costs than have been incurred, if the former we would impose less than could have been incurred by separate convictions.

Our powers of amendment are extremely wide, as pointed out in *Regina v. Lake*, 7 P. R., and we ought to amend if it is possible to do so, but I do not think that they are wide enough to enable us to amend this conviction. It ought therefore, in my opinion, to be quashed.

HARRISON, C. J., and WILSON, J., concurred.

Rule absolute.

TYLEE ET AL. V. HINTON.

Mortgage payable by instalments—Covenant to pay the whole on default—Relief—G. O. Chy. No. 461.

A mortgage, purporting to be under the Act respecting short forms of mortgages, was for \$12,500, payable with interest in ten equal annual instalments, and contained a covenant (not following the statutory form): "that in the event of default in the payment of any one instalment or any part thereof he (the mortgagor) will pay unto such mortgagees the said principal money then remaining unpaid, and interest, forthwith after making said default, should the said mortgagees so require (without demand)." The plaintiff sued on this mortgage, alleging non-payment of the first instalment due on the 12th August, 1877, whereby the whole \$12,500 became due. Defendant paid into Court the first instalment, and as to the residue pleaded that the \$12,500 was a balance of \$14,000, the purchase money of land bought by defendant from plaintiffs, on which he had paid \$1,500; and he prayed for relief and a stay of proceedings.

Held, WILSON, J., dissenting, that such relief might be granted, under G. O. in Chancery, No. 461, which is not confined to suits for foreclosure.

ACTION on a covenant. The declaration set out the covenant in a deed made on the 16th September, 1876, by the defendant with the plaintiffs, that the defendant would pay \$12,500, with interest at 7 per cent. as follows, the principal sum in ten equal annual instalments of \$1250 each, the first payment to be made on the 12th August, 1877, and the interest on the whole unpaid principal money to be computed from the 12th August, 1876, to be paid yearly on the 12th August in each year, the first payment to be made on the 12th August, 1877. And it was provided in and by the said deed, and it was thereby agreed by and between the said parties thereto, that if default should happen to be made in payment of any one instalment of the said principal money on any day therein before limited and appointed for the payment thereof, then the whole unpaid principal money, together with all interest thereon; should forthwith, at the option of the plaintiffs, (by reason of such default) be and become immediately due and payable, anything in the said deed to the contrary thereof in any wise notwithstanding, as if the time therein mentioned for the payment of such principal money had

fully come and expired. And the defendant covenanted with the plaintiffs in case of default to pay the principal money then unpaid and interest forthwith if the plaintiffs required, without demand. The plaintiffs averred default by defendant to pay \$1250, the instalment which became due on the 12th August, 1877, and the interest on the unpaid principal money from the 12th August, 1876, whereby the whole \$12,500, with interest thereon, became due and payable.

The defendant pleaded, as to the first instalment of principal and interest, that he brought the same into Court in full satisfaction of the same.

And, as to the residue of the money claimed, that the \$12,500 was a balance of \$14,000 agreed to be paid by the defendant to the plaintiffs as the purchase money of certain lands then purchased by the defendant from the plaintiffs, of which the defendant then paid to the plaintiffs the sum of \$1500, and gave the deed in the declaration mentioned by way of mortgage, securing upon the said lands the balance of the said purchase money of \$12,500 and the interest thereon; and the residue of the money in the declaration mentioned over and above the money in the first plea mentioned, is claimed only by way of forfeiture for the non-payment of principal and interest in the first plea mentioned on the day when they became due. And the defendant prayed for relief, and that proceedings be stayed until further default (if any) should happen to be made.

An application was made to Mr. Dalton, C. C. and P. in Chambers, to stay proceedings under the last plea, who made an order as asked on the 25th of September, which order was appealed from to Wilson, J., sitting in Chambers, and by him reversed.

The cause was tried before Burton, J., without a jury, at the last Fall Assizes at Ottawa.

The mortgage was put in and proved.

It was contended by counsel for the defendant that the defendant should have a verdict: 1. Under the general

equity jurisdiction. 2. Under the Chancery order in such a case, No. 461. 3. Because that would carry out the real transaction between the parties. 4. Because the covenant is in the nature of a penalty. 5. It is a forfeiture against which equity would relieve.

His Lordship thought there was an express agreement between the parties that the whole amount should become due, and that were he to give assent to the defendant's contention he would be making a new agreement for the parties; and he entered a verdict for the plaintiffs for \$11,366.40 over and above the amount paid into Court.

The mortgage proved purported to be made "in pursuance of the Act respecting short forms of mortgages." It recited that defendant was indebted to plaintiffs in \$12,500, and that he had "agreed to secure the payment thereof with interest thereon."

The proviso was to pay \$12,500, with interest at 7 per cent., in ten equal annual instalments; and it was also provided "that if default shall happen to be made in the payment of any one instalment of principal money on any day herein before limited and appointed for the payment thereof, then the whole unpaid principal money, together with all interest thereon, shall forthwith, at the option of the said mortgagees (by reason of such default), be and become immediately due and payable, anything herein contained to the contrary thereof in anywise notwithstanding, as if the time herein mentioned for the payment of such principal money had fully come and expired."

The covenant in question is as follows :

"And the said mortgagor covenants with the mortgagees that in the event of such default in the payment of any one instalment, or any part thereof, he will pay unto such mortgagees the said principal money, then remaining unpaid, and interest, forthwith after making such default, should the said mortgagees so require (without demand.)"

During this term, November 20, 1877, *Beatty*, Q. C., obtained a rule *nisi* to set aside the verdict, and enter it for the defendant; or for a new trial; or to transfer the suit to the Court of Chancery as specially within the province of that Court, or for such other rule as should seem

meet to the Court, on the grounds:—1. That it is opposed to the equity of the Court to allow the plaintiff to recover the whole mortgage amount claimed to be due by default in one payment when the amount actually due is paid. 2. That the verdict is contrary to law and evidence. 3. That the orders of the Court of Chancery apply, allowing relief by stay of proceedings on payment of the amount actually due, as in the case of foreclosure, and by force of the Administration of Justice Act. 4. That the Court will enforce the real transaction between the parties, and that the acceleration of payment is collateral and incidental to the main transaction. 5. That the acceleration of payment or calling in the whole mortgage—notwithstanding the proviso, is for payment by instalments not yet due—is a penalty or forfeiture against which equity will relieve where the principal, interest, and costs are paid, as in this case, which by the terms of the proviso are due. 6. That the mortgage is made in pursuance of the “Act respecting short forms of mortgages,” and the covenants and provisoes for acceleration of payment come within the terms of that Act, and are to be governed by it, as defined in the second column. 7. Or why proceedings should not be stayed, on the grounds aforesaid. 8. And why the order made by Mr. Justice Wilson should not be reversed on the grounds aforesaid, and affidavits and papers filed.

During the same term, December 8, 1877, *S. Richards*, Q. C., shewed cause. There is no authority that in equity the Court would stay proceedings under circumstances like the present; on the contrary, the authorities are the other way: *Sterne v. Beck*, 8 L. T. N. S. 588; *Trust & Loan Co v. Drennan*, 16 C. P. 321, 327; *Northey v. Trumenhiser*, 30 U. C. R. 426, 429. The case of *Knapp v. Cameron*, 6 Grant 559, is not a decision on the point, though the Chancellor stated he might have granted an interim injunction. The order of the Court of Chancery, 461, is in terms confined to foreclosure suits, and any curtailment of a mortgagee's rights cannot be extended beyond its language. 7 Geo. II. ch. 20, which gave certain relief in cases of fore-

closure, was held not to apply to bills for sale : *Fisher on Mortgages*, 2nd ed., vol. 1, 367 ; *Praed v. Hull*, 1 Sim. & Stu. 331; much less can the order apply or be extended to an action on the covenant for payment of the mortgage money.

Beaty, Q. C., contra. The rule of the Court of Chancery applies to this case. If not, the defendant is protected by the Short Form of Mortgage Act, 27-28 Vic. ch. 31, 2nd column. A Court of Equity would relieve the defendant. The rule is, that where the primary agreement is to pay a whole debt, and then an agreement is made to pay it by instalments, with the further agreement that the whole shall become due on default in one instalment, there is no relief; but where the primary agreement is to pay by instalments, then, in case of default of one instalment, the Court will relieve against a provision that all should become due on that event happening. He cited *Thompson v. Hudson*, L. R. 4 H. L. 1; *Ford v. Earl Chesterfield*, 19 Beav. 428; *Boland v. McCarroll*, 38 U. C. R. 487; *Sterne v. Beck*, 8 L. J. N. S. 588; *Knapp v. Cameron*, 6 Grant 559.

December 28, 1877. ARMOUR, J.—The defendant bases his claim to relief in this suit upon three grounds :

1. Upon general order 461 of the general orders of the Court of Chancery, promulgated June 3rd, 1853, which he claims applies to this suit in such a manner as to entitle him to the relief he seeks.

2. Upon the general jurisdiction of a Court of equity, to relieve against penalties and forfeitures, claiming that the provision for the acceleration of payment in the mortgage sued on is a penalty such as a Court of equity will relieve against.

3. That the mortgage sued on, being expressed to be made in pursuance of the Act respecting short forms of mortgages, the equitable relief provided for in schedule 2, column 2, clause 16 of that Act is applicable to it, although the corresponding clause in column 1, of the same schedule, has not been embodied in it.

The general order above referred to is as follows :
 "461. Where a suit has been instituted for the foreclosure of the equity of redemption in any mortgaged property, for default in the payment of interest, or an instalment of the principal, any defendant may move to dismiss the bill upon paying into Court the amount then due for principal, interest, and costs."

Under this order two questions arise :—

1st. Would the Court of Chancery, under the equity of this order, on a bill filed for the redemption of the mortgaged property, and to stay proceedings at law on the covenant, grant relief to the person entitled to redeem, upon payment of the same amount of principal and interest as such person would have been obliged to pay in order to obtain relief had a suit for foreclosure been brought against him, and he had moved to dismiss the bill under this order; or, in other words, is this general order applicable as well to a redemption as to a foreclosure suit. If it is, it applies to this case.

2nd. Do the words in the order—the amount then due for principal and interest—include the amount then due by reason of default only as well as the amount then due by reason of lapse of time, or do they include the amount then due by reason of lapse of time only? If the latter, and the order applies to a suit for redemption, as well as to a suit for foreclosure, the defendant is entitled to relief in this suit, for he has paid all that is due by reason of lapse of time only.

Had I been called upon to decide upon the meaning of the words "the amount then due," and no previous decision had been had thereon, I would have held that these words meant the amount then due by the contract between the parties; but if these words have been construed differently by the Court of Chancery, I ought to defer to its decision.

Prior to the promulgation of the general order above referred to, upon default in payment of any part of the principal or interest secured by a mortgage, the mortgagee was entitled to file his bill for foreclosure, and the mort-

gagor was entitled to relief only upon payment of the whole mortgage money, as well that over due as that to become due ; and in like manner upon a like default if the mortgagor filed his bill to redeem, he could obtain relief only upon like payment of the whole mortgage money ; and this was so in respect of a mortgage containing no provision for the acceleration of payment by reason of default : *Cameron v. McRae*, 3 Grant 311.

To remedy this apparent hardship upon a mortgagor this general order was made, and the effect of this order in both the aspects of it, to which I have adverted, soon came to be considered by the Court which made the order.

In *Moore v. Merritt*, 6 Grant 550, a bill was filed to redeem by a defendant in a suit at law, upon the covenant contained in a mortgage, in which suit judgment had been recovered for the first instalment payable by the mortgage, other instalments not having matured.

And the learned Chancellor in giving judgment upon this bill says, p. 552, "Now, it is quite clear, I apprehend, that the plaintiff could not have obtained this relief under the practice which prevailed previous to the new orders. The condition having been broken, Merriott acquired a right to foreclose, which could only have been resisted upon payment of the whole debt. It is equally clear that this case does not come within the letter of the order, which only provides that a bill of foreclosure may be dismissed at the instance of any defendant, upon payment, not of the whole debt, which would have been necessary under the existing practice, but of the amount actually due, whether for principal or interest. But this case does seem to me, I must confess, to come within the spirit and equity of the order. If a bill of foreclosure may be dismissed *at the instance of any defendant*, on payment of the amount actually due, and if the effect of such dismissal would be, as I think it would, to place the parties in the same position as if no default had been committed, then it seems to me to follow that the mortgagor, or those claiming under him, should be entitled to

the same relief, upon a bill filed on their own behalf for that purpose. Thus far, therefore, my opinion is in favour of the plaintiffs."

Dornyn v. Fralick, 21 Grant 191, was a bill filed by the plaintiff to declare a deed absolute in form to be a mortgage merely, to be let in to redeem, and to restrain an action of ejectment brought by the defendant.

In that case the present Chancellor, in giving judgment, says, p. 194, "At the hearing I reserved one point in this case, viz., whether, this being a bill to redeem, General Orders 461 and 462, which are in terms made to apply to a suit for foreclosure, apply in this case. I find that the point was before the late Mr. Blake, in the suit of *Moore v. Merritt*, and he expressed the opinion that it came within the spirit and equity of the order. In that I entirely concur. To hold otherwise would be very unreasonable."

The suit at law of *Cameron v. Knapp*, 7 C. P. 502, brought upon a covenant like that sued on in this case, in a mortgage made by Knapp and another to Cameron, necessitated the suit of *Knapp v. Cameron*, 6 Grant 559, in which latter case the then Chancellor expressed the opinion that under the general order referred to the mortgagor seeking relief in the Court of Chancery, against proceedings at law, taken to enforce payment not only of the amount due by reason of lapse of time, but also of the amount due by reason of default only, was entitled to relief upon payment of what was due by reason of lapse of time only.

This opinion of the then Chancellor has since been followed by the present Vice-Chancellor Blake, in *McLaren v. Miller*, 20 Grant 637. This latter case was a bill filed for the redemption of a mortgage containing a stipulation for the acceleration of payment by reason of default, similar to the mortgage sued on in this case; and the learned Vice-Chancellor, after adverting to the state of the law as it existed before the passing of the general orders of 1853, says, p. 639, "This was the penalty which a mortgagor paid for not meeting the instalments on his mortgage as they became due; and he paid this penalty equally whether a

special provision were inserted in the instrument whereby it was agreed that this should be the result of default, or whether such a clause were omitted. I do not see that the mortgagee stands in any better position because the instrument under which he claims contains, in so many words, a condition which the Court annexed, independently of agreement, to every mortgage. If this view be correct, it follows therefrom that the general order of the Court which relieves against forfeiture in the one case will relieve also in the other; and that in neither case can the mortgagee insist, although there be default, on calling in the whole amount secured by the mortgage. The order in its spirit, if it does not in the letter, strikes at the right of a mortgagee to collect his instalments, except as defined in his deed, apart from any penal clause added to the document, or by the former practice or rule in force in such cases."

The decisions above referred to establish that order 461 is applicable to such a case as that in hand—that it applies equally to a suit for redemption as to a suit for foreclosure, and that the words used therein, "the amount then due," mean the amount then due by reason of lapse of time only, and do not include the amount then due by reason of default only; and as these decisions are the decisions of a Court having co-ordinate jurisdiction in a matter like the present, and such matter being a matter so peculiarly within the province of that Court, as the construction to put upon one of its own orders, I think that we ought to follow them until they are reversed by an appellate Court.

This decision, upon the first ground of relief insisted upon, renders it unnecessary to pass upon the remaining ones.

The rule will, therefore, be absolute to set aside the verdict for the plaintiffs, and to enter the verdict for the defendant.

HARRISON, C. J.—When this case was before us for argument my opinion was with the plaintiff. That opinion has been shaken by the opinion expressed by my brother

Armour. The difference of opinion between my brothers Wilson and Armour shew that there is doubt as to what is the law. In a doubtful case I think it better to lean to the party who has justice on his side. I therefore concur in the opinion of my brother Armour.

WILSON, J.—I regret the plaintiff should continue to prosecute this very unjust suit, and I regret it because I am obliged, from the view which I take of the law, to give effect to his claim. As the majority of the Court is of a contrary opinion, the injustice he is guilty of will not be successful.

The reason I come to a different conclusion is because I conceive the law is against the defendant.

It is clear that on the failure of a mortgagor to pay any part of his debt, principal or interest, the mortgagee might foreclose, and his suit could not be stayed but upon payment of the whole of the mortgage money, as well that which was not due as that which was past due: *Cameron v. McRae*, 3 Grant 311.

By the General Order 32, sec. 5, of June, 1873, (Consol. G. O. 461,) the mortgagor is permitted in a foreclosure suit to pay the arrears of debt and interest, and to have the suit stayed on payment of costs.

It is admitted that when a mortgagor applies to redeem his case is not provided for by the general order. The Chancellor, in *Moore v. Merritt*, 6 Grant 550, said such a case was however "within the spirit and equity of the order."

In *Knapp v. Cameron*, 6 Grant 559, it was held that a proviso in a mortgage making the whole money due on the default of the interest within ten days after the same fell due, was in the nature of a penalty, and might be relieved against.

I am of opinion, for the reason before given, that such a provision is not in the nature of a penalty.

In *McLaren v. Miller*, 20 Grant 637, the case of *Knapp v. Cameron* was approved of, although the principal case was not one of the same nature.

The general order in question was probably of doubtful authority, as it was manifestly against the power which the Court ever assumed to exercise in such a case; and the 20 Vic. ch. 56, sec. 21, Consol. Stat. U C. ch. 12, sec. 75, confirmed all the then existing general orders of the Court.

If the rule in question applied to a suit by a mortgagor to redeem, upon paying the amount actually due, it would be proper to extend it to a case of this kind, where the condition was that, upon any default of payment, the whole mortgage money should be at once due.

But, in my opinion, such a case is not within the terms of a rule which provides only for cases of foreclosure. There is no general equity of the Court to relieve a mortgagor from paying off the whole debt when he is once in default, and proceedings in foreclosure are taken against him, as the case cited, and the passing of the general order referred to plainly establish. It was not relieved because it was not a penalty to enforce the immediate payment of the whole debt upon default of a part of it, but a mere failure of the mortgagor to perform the condition he had engaged to keep, with respect to which the Court had no power to interfere.

In *Gregory v. Wilson*, 9 Hare 683, it is said the Court will not relieve lessees against the legal consequences of breaches of covenant, as well in cases which rest on contract, as where the legal relation between the parties is established. And that neither in cases of accidental neglect to perform the covenants to repair, nor in case of wilful or obstinate breaches of covenants will the Court relieve the tenant against the consequences of the breach.

The like doctrine was laid down in *Job v. Banister*, 2 Kay & J. 374, where the tenant had broken his covenant to insure and to repair, and the Court dismissed his bill for a renewal of the term because of his forfeiture of it. Yet the Court said it was a very hard case, and on account of the hardness of it dismissed the bill without costs.

And again, in *Noker v. Gibbon*, 3 Jur. N. S. 726, where the Court declined to interfere on behalf of a tenant who had failed to drain according to his covenant.

In *Hughes v. Metropolitan R. W. Co.*, L. R. 1 C. P. D. 120, in Appeal, the Court stayed the execution on a judgment in ejectment recovered for forfeiture of an alleged breach of covenant to repair, because the landlord had, by his conduct, misled the lessee into supposing that the covenant would not be insisted on, but the general doctrine was not denied that the Court would not relieve against the breach of a covenant to repair, or the like.

It is only in the case of non-payment of rent at the day that relief is given: *In re Dagenham (Thames) Docks Co.; Ex parte Hulse*, L. M. 8 Ch. 1022.

Where an incorporated company agreed to buy land for £4000, and paid £2000, and the remaining £2000 was to be paid at a future day, with a proviso that if the £2000 and interest were not paid by that day, in respect to which time was to be of the essence of the contract, the vendors might repossess the land without any obligation to repay any part of the purchase money. Held, the Court could relieve against the forfeiture of such a covenant, because the stipulation was in the nature of a penalty.

The general order I have referred to applies in terms only to proceedings by way of foreclosure. It does not in terms apply to a sale or to a redemption bill. Why not? Because, I presume, when a sale is directed, the whole mortgage debt, as well that which is not due as that which is past due, is to be settled and paid off at once; and in a redemption suit, which I assume is resorted to only when the whole debt is due or is ready to be paid off, because the whole debt is then cleared off.

When a sale is ordered there is no forfeiture effected as in the case of a foreclosure, but the debtor gets the full value which a sale of that kind brings, of his property. and where redemption is allowed there is, of course, no forfeiture either, but the very contrary.

Now what the rule proposed to provide against was the forfeiture of the property when only a part of the debt was due, and it may have been a good deal of it had been paid. Is this case analogous to such a state of things?

The mortgagor was in default for an early instalment, leaving many instalments not yet due in point of time, and they amount to a considerable sum. The mortgagee has brought ejectment, and has got a verdict upon the assumption that by the terms of the covenant the whole debt secured by the mortgage has become due by reason of the default in payment of one of the instalments which the mortgagor had made. If he get the possession of the land the mortgagor forfeits nothing. He must account for the rents and profits until he is redeemed, or he may hereafter proceed to foreclose the defendant. If he do, it may be the Court would even then, under the general order, relieve the debtor upon paying up all arrears and costs according to the original agreement. I see no reason why that might not be done.

So if the mortgagee had sued the debtor on his covenant for the whole amount of the demand, claiming it all as due by reason of the default aforesaid, and had recovered judgment for the whole amount, he could proceed against the land in two ways. He might sell the equity of redemption at law, and that would, in contemplation of law, be no forfeiture, because the defendant would get the benefit of the sale; or the creditor could proceed to foreclose, and in that case the Court might still give the mortgagor relief upon the original agreement by his paying up the arrears and costs, and letting the judgment at law stand as an additional security to the mortgagee for the due payment of the later instalments.

It may be, that on a recovery at law for the whole debt the mortgagee might be able to raise his money by the sale of other property of the debtor, and in that case the debtor would have no redress for the alleged injustice which was done to him by the acceleration of his payments. No doubt that may be so, and unquestionably it is a hard case, and one in which there should be, if there is not, some relief for one so harshly pressed. Yet, notwithstanding all that, there would be no forfeiture in law of anything.

But can it be said there was no relief? The Act respecting short forms of mortgages provided for this very

case. The mortgage was in part drawn under it, but as regards the clause for the payment of the money the parties have voluntarily departed from it, and now, when the statute would have been a full protection to the defendant if he had conformed to it, he says he is as much entitled to the benefit of it, though he has not acted under it, as if he had in every particular guarded himself by its provisions.

The case, then, not being within the terms of the general order, nor within the statute, and not being a penalty, but an ordinary breach of covenant, against which a Court of equity has not the power to relieve, I do not know upon what lawful ground the plaintiff can be deprived of his very unjust vantage ground.

It may be there should be some further legislation made for persons who will not take advantage of what has been already done for them, and who seem determined not to take care of themselves. But I do not understand that the Court of Chancery, or any Court in this country exercising equitable powers, has ever assumed to right everything which may be conceived to be wrong or oppressive of its own mere motion and authority.

I am obliged to say the defendants have not made out a case, either at law or in equity, for relief.

Rule absolute.

REGINA V. NASMITH.

Husband and wife—Duty of husband under 32-33 Vic. ch. 20 sec. 25—Conviction.—Evidence.

An indictment under 32-33 Vic. ch. 20 sec. 25, alleged that E. S. was the wife of defendant, and was willing to live with him as such: that it was defendant's duty to provide the necessary food, clothing, and lodging for her sustenance; and that he, on, &c., and from thence hitherto, unlawfully, wilfully, and without lawful excuse, did refuse and neglect to provide the same, contrary to the statute, &c.: *Held*, that the allegation that she was ready and willing to live with defendant was surplusage, and need not be proved; but that it must be shewn that she was in need, and that the defendant had the ability to supply her wants; and as this did not sufficiently appear by the evidence a conviction was set aside.

CRIMINAL CASE reserved by Galt, J., from the Summer Assizes of 1877 at Toronto.

The indictment alleged that "before the time of the committing of the offence hereinafter mentioned, Alexander Nasmith was the husband of Ellen Nasmith, and that the said E. N. before the time of the committing of the said offence, and during all the time hereinafter mentioned, was the wife of the said A. N., and as such wife was willing to live with the said A. N., and during all the time hereinafter mentioned it was the duty of the said A. N. to provide the necessary food, clothing, and lodging for the sustenance, support, and nourishment of the said E. N.; and that the said A. N. on the 1st January, 1873, and on divers other days between that day and the day of the taking of this inquisition, then and during all the time being legally liable to provide for the said E. N., as aforesaid, the necessary food, clothing, and lodging for the sustenance, support, and nourishment of the said E. N., unlawfully, wilfully, and without lawful excuse, did refuse and neglect to provide the same, against the form of the statute," &c.

The defendant and his wife were married in 1863. They lived together for some years and had a family. Being unable to live together in peace, owing, it was said, to her jealous disposition, they separated. He from time to time

afterwards, till 1872, paid her money as she needed it for her support. He in that year, being a mechanic, and work being dull in Canada, left for the United States in search of work. He remained abroad for about a year. During that time he sent her some money. He then returned to Canada, and had since received occasional employment, but there was no clear evidence of his ability after January, 1873, to contribute to her support, or that the wife was in much, if any, need of support from him. Her children were supported in the Orphans' Home. She supported herself by her own exertions. There was no evidence of any desire on her part to return to her husband, and there was evidence that he was not willing to receive her.

The defendant was found guilty, but the learned Judge reserved judgment, and reserved upon the evidence, which was made a part of the case, two questions for the consideration of this Court :—

1. Whether it was necessary that there should be evidence to sustain the allegation of the readiness and willingness of the wife to live with her husband.

2. Whether on the other facts of the case the prosecution could be sustained.

The jury also found that there was no evidence that the wife was ready and willing to live with the defendant.

December 3, 1877, the case was argued.

W. Francis for the prisoner. The indictment states that the wife was "willing to live with" her husband; and if that is a material part of the indictment, there was no evidence of it. The indictment is defective in not shewing that some bodily harm would result to the wife from the desertion, or other injury of that nature, and in not shewing that she is in want of food, &c. The same case should be alleged and proved as would support a claim for alimony in Chancery. He cited *Severn v. Severn*, 7 Grant 109; *Regina v. Plummer*, 1 C. & K. 601.

Irving, Q. C., for the Crown. The words, "willing to live with," &c., are surplusage, and need not be proved, but

may be struck out. If the indictment is defective in this respect, it has been cured by the verdict. [HARRISON, C. J.—We are of opinion that allegation need not have been proved.] As to the other point, the obligation of the husband to provide for the maintainance of his wife, he referred to *Reeve v. Wood*, 5 B. & S. 364; *Flannigan v. Bishop Wearmouth*, 8 E. & B. 451; *Thomas v. Alsop*, L. R. 5 Q. B. 151; *Regina v. Chandler*, 1 Dears. 453; *Regina v. Ryall* L. R. 1 C. C. 99; *Regina v. Hogan*, 2 Den. C. C. 277; *Regina v. Cooper*, 2 C. & K. 876; *Regina v. Phillpot*, 1 Dears. 170; *Regina v. Downs*, L. R. 1 Q. B. D. 25.

December 28, 1877. HARRISON, C. J.—It is enacted by 32–33 Vic. ch. 20, sec. 25, D., that “Whosoever being legally liable either as [a husband, parent, guardian, or committee], master or mistress, [nurse or otherwise], to provide for [any person as wife, child, ward, lunatic, or idiot], apprentice or servant, [infant or otherwise], necessary food, clothing, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, or unlawfully and maliciously does or causes to be done any bodily harm to any such *apprentice* or *servant*, so that the life of such *apprentice* or *servant* is endangered, or the health of such *apprentice* or *servant* has been, or is likely to be, permanently injured, is guilty of a misdemeanor,” &c.

The section, except as to the words in brackets, is a transcript of the English Statute 24 & 25 Vic. ch. 100, sec. 26.

These words were in the bill as introduced, but were struck out by the Select Committee in the House of Commons: *Greaves* Crim. Acts 56.

An indictment against a master at common law for not providing sufficient food and sustenance for a servant, whereby the servant became sick and emaciated is not good—*Rex v. Ridley*, 2 Camp. 650—unless it allege that the servant was of tender years and under the dominion and control of the master: *Rex v. Friend and wife*, Russ. & Ry. 20.

The reason of the restriction is, that if the servant be not of tender years, he may if not provided with proper nourishment, remonstrate, and, if necessary, leave the service.

The law is undisputed that if a person, having the care and custody of another who is helpless, neglects to supply him with the necessaries of life, and thereby causes or accelerates his death, it is a criminal offence. But the law is also clear that if a person, having the exercise of free will, chooses to stay in a service where bad food and lodging are provided, and death is thereby caused, the master is not criminally liable: per Erle, C. J., in *Rex v. Charlotte Smith*, 10 Cox 94.

In *Scarman v. Castell*, 1 Esp. 270, it was held by Lord Kenyon that a master is bound to provide medicine and attendance on his servant while such servant remains under his roof as part of the family. But the law is now otherwise: *Winnall v. Adney*, 3 B. & P. 247; unless in the case of an apprentice: *Rex v. Stokes*, 8 C. & P. 153.

In *Regina v. Waggstaffe*, 10 Cox 530, it was held that where, from conscientious religious conviction that God would heal the sick, and not from any intention to avoid the performance of duty, the parents of a sick child refused to call in medical assistance, though well able to do so, and the child died, that there was no criminal offence; but the contrary is now the law under a statute providing for the case: *Regina v. Debores*, L. R. 1 Q. B. D. 252.

Underlying most of these cases are two things which appear to be essential to criminal responsibility:—

1. Ability to perform the duty: See *Rex v. Hogan*, 2 Dears. 277; *Regina v. Phillpot*, 1 Dears. 179; *Regina v. Chandler*, 1 Dears. 453; *Regina v. Rugg*, 12 Cox 16.

2. Bodily harm or injury to health arising from neglect to perform the duty: See *Regina v. Cooper*, 2 C. & K. 876; *Regina v. Phillpott*, 1 Dears. 179.

Without ability to perform there can not be said to be a neglect to perform, and therefore after verdict an indictment which, without specifically alleging the ability,

avers neglect, will be held sufficient : *Regina v. Ryland*, L. R. 1 C. C. 99.

Similar duties to the foregoing are cast upon the husband in relation to his wife ; and where the husband is possessed of means, the ordinary remedy in this Province for breach of such duties is a bill for alimony in the Court of Chancery : *Severn v. Severn*, 3 Grant 431; S. C. 7 Grant 109.

The law casts upon the husband the obligation not only to nourish and support his wife, but to shelter her ; and if he fail in the performance of these duties, the wife has the implied authority of the husband to pledge his credit for what are called necessities.

If the wife leave her husband under circumstances which justify her in leaving the husband, he is still bound to maintain her ; and she is, in such case, entitled to pledge his credit for necessities : See per Cockburn, C. J., in *Thomas v. Alsop*, L. R. 5 Q. B. 15, 155.

If, however, a wife after departure from her husband earns her diet by her labour, the husband shall not be charged for the diet : *Comyn's Dig.*, "Baron & Feme," Q.

If the wife live with another man as an adultress, she is divested of all authority which arises out of the marital relation : *Atkins v. Pearce*, 2 C. B. N. S. 763.

Where husband and wife are separated by common consent, the husband granting the wife a stipulated allowance which is regularly paid, he is not bound to supply her with shelter ; but if he knows or be informed that she is without shelter, and refuses to provide her with it, in consequence of which her death ensues, if it can be shewn that her death was caused or accelerated for want of shelter, it would appear that the husband may be indicted for manslaughter : *Regina v. Plummer*, 1 C & K. 601.

While ill-usage will justify a wife in leaving her husband, if he promise her better treatment, and offer to support her, he cannot be convicted of wilfully refusing to support her—*Flannagan v. Bishop Wearmouth*, 8 E. & B.

451—unless it appear that there will be real danger to her life or health in the event of her return : *Thomas v. Alsop*, L. R. 5 Q. B. 151.

The Imperial Legislature, in 1851, having by preamble declared that it is expedient “to make provision for the better protection of persons who are under the care and control of others as apprentices or servants, declared” that where the master or mistress of any person shall be legally liable to provide for such person, as an apprentice or as a servant, necessary food, clothing, or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same ; or where the master or mistress of any such person shall unlawfully and maliciously [assault such person whereby the life of such person shall be endangered, or the health of such person shall have been, or shall be likely to be permanently injured], such master or mistress shall be guilty of a misdemeanor.

This was re-enacted by the 24 & 25 Vic. ch. 10, sec. 26, the only alteration being, the substitution of the words “do or cause to be done any bodily harm to,” for the words “assault such person whereby,” &c.

When this last Act was passed, there were persons in England who thought that some similar measure of protection ought to be extended to wives, lunatics, and idiots, as therein extended to apprentices and servants.

Prominent among these was Mr. Greaves, Q. C., who prepared the English bill, using in it language to that effect in the bill already mentioned, most of which had been approved by the committee of the Lords, but was struck out by the select committee of the Commons.

The argument in favour of the extension of the law as he proposed was, that while apprentices and servants are generally quite able to remonstrate against ill-treatment, and remove themselves from its influence, married women, children, lunatics, and idiots are either not so free to do so or so capable of doing so.

In England, where the Act is restricted to apprentices and servants, it is a question whether it is not neces-

sary to sustain a prosecution under the Act to allege and to prove that by the refusal or neglect the prosecutor's life was endangered, or his health injured; and in the last edition of *Archbold's Criminal Pleading*, 18th ed., at p. 726, it is recommended that the Act be so read until there be a decision to the contrary.

This is also the advice of Taschereau, J., in the case of a prosecution by an apprentice or a servant under our Act. See 1 *Tasch.* 258.

We are now called upon to place a construction upon our Act, in the case of a prosecution of a husband for refusal or neglect to support his wife.

Whatever argument may be adduced for the purpose of shewing that under the Act, where the prosecutor is an apprentice or servant, there must be bodily harm, or harm (present or prospective) to health, it would not appear to be necessary where the prosecutor is the wife of the defendant; for the part of the section which speaks of bodily harm or injury to health, does so *only* in the case of "an apprentice or servant" being the prosecutor.

There may or may not be a good reason for the distinction. But when we find the language so free from ambiguity as to manifest a change of intention, we need not concern ourselves about the reason. The change of intention by the change of language here seems to be too clear to be seriously doubted.

The anomaly, however, is presented of a wife indicting and prosecuting her husband as a criminal for neglect of marital duties where there is no pretence of bodily harm, or present injury to health; and this offence is created by a clause in an Act providing for "offences against the person." Before the Act the ordinary remedy in such a case was, the filing of a bill for alimony in the Court of Chancery. This law, which is in advance of the legislation of the mother country, will not in its administration be found free from difficulties. But so long as it exists it is the duty of the Courts to administer it as best they can.

It appears to us under our Act, as framed, that in the case of a prosecution by a wife of her husband, it is

necessary to prove that the defendant is the husband of the prosecutrix, that the wife was in need of food, clothing, or lodging, that the husband was able to provide the same, but wilfully and without lawful excuse refused or neglected to do so.

The obligation is not the absolute one under all circumstances to provide food, clothing, or lodging, for the wife. The wilful refusal or neglect to do so without lawful excuse, is what constitutes the offence.

If it appear that the refusal or neglect instead of being wilful is attributable solely to want of ability, that the wife is better able to support herself than the husband to support her, that she is in no need whatever of support, and does not ask for it or require it, that she is living with another man as his wife, or that without justification she absents herself from the husband's roof, and without excuse refuses to return—in these, and similar cases, it would be absurd to convict the husband as a criminal. In such and similar cases it must be held that there is "lawful excuse" for what otherwise might be held a wilful refusal or neglect.

It must not be overlooked that the prosecution is a criminal one, and that unless the presumption of innocence is overthrown by clear proof of such facts as are necessary to constitute criminal responsibility under the Act, there should be an acquittal.

The weakness of the present prosecution is, that it does not sufficiently appear in the evidence that the wife, at the time alleged in the indictment, was in need of food, clothing, or lodging, or that at such time the husband had the ability to do what was needed.

The allegation in the indictment to the effect that the wife was ready and willing to live with her husband is, without more, senseless. It may be struck out of the indictment, and enough remain to constitute the offence in the words of the statute. It is not, therefore, open to the defendant, if in other respects properly convicted, to take any advantage of the imperfection of such an allegation, or of any omission to prove it.

We must answer both the questions submitted for our opinion in the negative. The negative answer to the second entitles the defendant to have the conviction quashed.

WILSON, J., concurred.

ARMOUR, J., was not present at the argument, and took no part in the judgment.

Conviction quashed.

BEIGLE V. DAKE.

*Statute of Limitations—Possession by patentee—C. S. U. C. ch. 88, sec. 3—
Title by possession.*

In ejectment for 25 acres, the north half of the north-east quarter of a 200 acre lot, it appeared that D., the patentee of the north half of the lot, entered upon it before 1837, built a house on the south-west part, and lived there, clearing and cultivating a few acres, and while there sold 75 acres, all but the land in dispute. About 1840 she left the country and joined the Mormons in the United States, but after many years she returned, and died at Fenelon Falls about 1863. It remained vacant until sometime between 1849 and 1855, when one A., having a title to the 75 acres sold by D., took possession of it, as well as of the 25 acres in dispute, cut timber on it, and cultivated it and repaired the fences—the 25 acres being then in a state of nature. He remained about ten years, and sold his right for \$10 to the defendant, who succeeded him. *Held*, that the plaintiff claiming under D., the patentee, was not entitled to the protection of Consol. Stat U. C. ch. 88, sec. 3, amended by 27 & 28 Vic. ch. 29, for D. had taken actual possession of this part within the meaning of the Act.

Held, also, that the plaintiff was barred by the statute (the action having been begun on the 22nd March, 1876,) for there had been possession for 20 years after a discontinuance of possession by the patentee.

The defendant, after action brought, offered the plaintiff \$100 if he would give him a warranty deed. *Held*, that this could not affect the defendant's title by possession.

EJECTMENT for the north half of the north-east quarter of lot 32 in the 6th concession of Cramahe.

The plaintiff claimed the land by deed to him from James Beigle, and by the title to James Beigle traced upward to the patentee of the Crown, Hannah Dingman. The defendant denied the plaintiff's title, and claimed the land by length of possession.

The action was commenced on the 22nd of March, 1876.

The cause was tried at Cobourg, at the Spring Assizes of 1877, before Burton, J., without a jury, who found a verdict for the plaintiff.

It was proved at the trial that Hannah Dingman, had nine children. James Beigle, the father and grantor of the plaintiff, got a deed from Catharine and Jane, two of the daughters of Hannah Dingman, of the north half of the lot, excepting the south fifty acres sold to Giles Dingman, a son of the patentee, who sold to Webb, who sold to Algar, who mortgaged it. It is now owned by Mr. Stephenson.

Simon, the eldest son of Hannah Dingman, was not shewn to be dead. He went to California 28 years ago, and was said to be married.

Giles, another son, married between 1830 and 1840, and had no children. He went to Pennsylvania about thirty years ago.

Jacob and William, other two sons, went to Missouri, in the western states, about 30 years ago.

Diana, a daughter of the patentee, and her two children died.

Charlotte, a daughter, went also to the western states about 30 years ago. She was married.

And Mary, a daughter, also married, went, more than 30 years ago, to Illinois.

None of those who went away had been heard of from for a very long time, for far more than seven years, as being alive.

Hannah Dingman lost her first husband, John Dingman, about 1821. She and her children moved on to this north half lot between 1830 and 1837. She built a house at the south end of the west half of the lot, and lived in it for three or four years, and cleared and cultivated seven or eight acres of it, and settled on the south fifty acres of the lot. She and her son Giles went off with the Mormons about three or four years after having first moved on to it.

Elisha Algar, who got Giles's title to the south fifty acres of the lot, went into possession twenty-six or twenty-seven

years ago, and he remained in possession till about twelve years ago, when the defendant entered into the north-east twenty-five acres of the lot, which were alone in dispute in this action. Algar lived on the adjoining lot 33 while he was in possession of the part of lot 32 which he claimed. Hannah Dingman died at Fenelon Falls about fourteen years ago.

Mr. *Bowen*, a witness for the defendant, said:—"It is twenty-six or twenty-seven years since the first clearing was made on these twenty-five acres. Algar made the clearing of six acres and put the fence round the twenty-five acres. The whole north fifty acres were wild when Algar went into possession."

George Black said:—"Knew Elisha Algar. Saw him cutting logs twenty-four or twenty-five years ago. He worked on it and tilled the ground. He was in possession of the defendant's portion—in fact of the whole. Algar cleared five or six acres on the piece in dispute."

Herman Coleman said:—"Knew the north half of 32 in the 6th concession. Knew Algar. Knew the part the defendant was in possession of. Algar was in possession before Drake. First knew Algar in possession in 1853 or 1854, and he remained in possession till he left. He cleared about two acres along the concession in 1855. In that year he cleared a piece south of that. * * He had a crop in. Drake worked on the piece afterwards. The twenty-five acres, I think the whole twenty-five acres, was fenced in 1855, am not quite certain. * * There was a fence on the east line; can't say that it enclosed the twenty-five acres. The north end was fenced also, and the west of the twenty-five acres; am not positive as to the south side."

Sylvester Moore spoke of Algar's cutting timber on the twenty-five acres in question, and of forbidding others to cut on it, and of his repairing the fences about it, and clearing on it about twenty-two years ago, and that he sold his right to the defendant for \$10.

The defendant said Algar was in possession since 1852 of the twenty-five acres in dispute, and he gave him \$10 for

his right. He said Algar "bought seventy-five acres of the north part of the lot. I don't know he took possession then. * * He cleared a part of these twenty-five acres. * * I understood Algar sold the north-west twenty-five acres about twenty-three or twenty-four years ago to Pennock; it was purchased for a portion of the mill-pond, for the mill on lot 33. The pond was partly on these two lots. The twenty-five acres * * have been so used ever since. * * There was a fence enclosing the whole twenty-five acres, that I am on, when the first clearing was made. There has been a fence round it ever since. Algar built it, I saw them building it. * * Algar worked it till I got possession. * * I offered to give Beigle \$100, provided he would give me a warranty deed; that was last fall."

There was a little more evidence given as to the possession, but it was not very important.

The assessment rolls were as follows:

In 1848 Algar was assessed for seventy acres of this lot. In 1849 for seventy-five acres, five acres cultivated; 1850 for the same; and his brother, Nathan Algar, in some way, for sixty acres. No rolls for 1851, 1852, or 1853. 1855 Elisha Algar for sixty acres; 1855 to 1859 Elisha Algar for fifty acres; 1860 Elisha Algar on lots 32 and 33 for 120 acres; 1861 to 1866 Elisha Algar on lots 32 and 33 for 145 acres; 1867 Elisha Algar's name not on the roll; 1868 Daniel Dake was assessed for twenty acres, fifteen cleared; and the same in 1869.

The plaintiff's examination was put in. He said he did not know what land the action was brought for, that his father got the deed to him from the patentee's two daughters, his father's step-sisters, about a year ago, and his father then made a deed to him. He gave nothing for the land, and would give nothing unless he got it; it was left to himself to say what he would give his father for it; and that his father lived for nearly forty years within twelve miles of the land.

The father, in his evidence, said he was about fifty years of age. He was born he thought in 1828.

The case was argued before the learned Judge. His note in disposing of the case was as follows :—

“I think there is no sufficient evidence of a continuous possession of this portion of the lot now sought to be recovered, and that the plaintiff has made out a *prima facie* title. Algar was in possession of another portion of the lot, but I think that the evidence shews that he was not in the occupation of this piece, and the price paid to him for the mere right to the possession shews that the defendant did not at that time attach much importance to it. I think, under these circumstances, I may fairly take into consideration his offer to purchase as evidencing the little faith he attached to his title. I find a verdict for the plaintiff.”

During Easter term, May 22, 1877, *John W. Kerr* obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant, on the ground that it was contrary to law and evidence.

During this term, November 27, 1877, *Armour*, Q. C., shewed cause. He stated, in addition to the facts before mentioned in the evidence, that besides the fifty acres of the south half of the north half of the lot which Hannah Dingman had sold to her son Giles, and which afterwards came to Webb, that she also sold to Webb the north-west 25 acres of the north half, so that Webb owned all the north half of the lot but the north-east 25 acres which are now in dispute, and Webb then sold the same seventy-five acres to Elisha Algar. The defendant went into possession of the land now claimed under Algar. The late statute reducing the period of limitation for the bringing of real actions does not apply, as the suit was brought before it came into operation, and therefore the period of forty years applies in favour of the plaintiff, who claims title under the patentee of the Crown. The evidence shewed that there had not been a possession against the patentee's title for twenty years, and that is quite sufficient for the plaintiff even if the late statute applied. Algar did not clear any on the land in question until 1855 or 1856. That part

of the lot was never fenced. Algar did not pretend he could give a title to the twenty-five acres. He sold his right to it to the defendant for \$10. Algar was never assessed for that part of the lot, nor had he such a possession as to exclude all others from it. He offered the plaintiff lately to buy the land from him. The Dingman family left the lot between 1837 and 1840. He referred to *Doe d. Cuthbertson v. McGillis*, 2 C. P. 124; *Dundas v. Johnston*, 24 U. C. R. 547; *Leech v. Leech*, 24 U. C. R. 321.

John W. Kerr supported the rule. The plaintiff has made a paper title to only two undivided eighth parts of the twenty-five acres. Hannah Dingman had nine children—one died. There are eight parts of the estate, and the plaintiff has a deed from only two of the children. The verdict in any case should not be for a larger part of the twenty-five acres than one-fourth part of it, for the other children were not shewn to be dead, and although more than seven years had gone by since they were last heard from, most of them were married and several of them had children, so that the plaintiff has not established a title to their part: *Lage v. Mackenson*, 40 U. C. R. 388; *Lyster v. Kirkpatrick*, 26 U. C. R. 217. As to possession, Hannah, the patentee, entered sometime not long after 1830, lived there for seven or eight years, and then left and has never since returned. Elisha Algar having bought seventy-five acres of the north half lot entered about 1847, and took possession of the whole 100 acres, which he kept until he left eleven or twelve years before the trial, when he sold the twenty-five acres now in dispute to the defendant for \$10, which possession he has kept to the present time. The twenty years were complete long before the bringing of this action: Consol. Stat. U. C. ch. 88, sec. 3; *Doe d. Pettit v. Ryerson*, 9 U. C. R. 276; *Stewart v. Murphy*, 16 U. C. R. 224; *Kipp v. The Synod of the Diocese of Toronto*, 33 U. C. R. 220; *Doe d. Carter v. Barnard*, 13 Q. B. 945; *Low v. Morrison*, 14 Grant 192; *Gray v. Richford*, 1 App. 112; *Davis v. Henderson*, 29 U. C. R. 344; *Heyland v. Scott*, 19 C. P. 165, 172; *Hunter v. Farr*, 23 U. C. R.

324; *Mulholland v. Conklin*, 22 C. P. 372; *Wallbridge v. Gilmour*, 22 C. P. 35; *McGregor v. Elliott*, 20 U. C. R. 299; *Doe d. Perry v. Henderson*, 3 U. C. R. 486. As to the offer to purchase, it is of no moment in this case, because it was after the defendant's statutory title was complete, and it was also after the commencement of this action.

December 28, 1877. WILSON, J.—I think the following facts may properly be extracted from the evidence given at the trial. Hannah Dingman, the patentee, entered upon the north half of lot 32, in the 6th concession of Cramahe sometime before 1837; built a house upon the south-west part of the half lot, or 100 acres, and resided on it; cleared a few acres and cultivated them.

While she was in possession she sold the south half of her 100 acres to her son, Giles Dingman, who sold the same part to one Webb, and Hannah Dingman after that sold the north-west twenty-five acres of her half lot to Webb, who sold the 75 acres he had so bought to Elisha Algar.

Hannah Dingman did not, so far as the evidence shews, ever part with the north-east twenty-five acres of her half lot, which is the land now in dispute.

She and her son Giles left the country about the year 1840 to join the Mormons in the United States. Giles has never returned; Hannah Dingman was away for many years, but she did return to this country although not to the land, and died at her daughter's residence at Fenelon Falls, about fourteen years before the trial.

Her other children either left the lot when she did or before it. She had nine children by her first husband. One, it is said, died here. Six of them went to different parts of the United States, and two remained here.

It is not necessary further to speak of the children at present, and it may not be necessary to do so at all, because the principal question is, whether the defendant and Algar, from whom he claims, have had such a possession of the land in question as to deprive the plaintiff, assuming him

fully to represent the title which Hannah Dingman, the patentee, had, of his right to the land ?

In what year Algar got his conveyance from Webb of the north half lot, excepting the twenty-five acres in dispute, does not appear, because there is not a single exhibit of title filed.

And I may say, while mentioning the want of these exhibits, that it is the greatest inconvenience to be obliged to grope through the evidence in a case which is sometimes very lengthy, to discover a date, when the document itself, if there, would settle the point at once. It has happened that cases have lain over for several terms for the want of exhibits, when it becomes difficult to take up the cause after so great a time, when many of the circumstances, which cannot always be noted, have passed from the mind. If the parties will not try to aid the Court in dealing fully and conveniently with the cases which are to be argued, it may be necessary to prevent any argument being proceeded with unless and until the exhibits are produced in Court, to remain there until judgment has been given.

If the conveyance to Algar were here it would shew probably the time he entered on the land which he bought. Mr. Kerr, in his argument, said it was in 1847. Bowen said it was twenty-six or twenty-seven years ago, which would be in 1849 or 1850. Black said it was twenty-four or twenty-five years ago when he saw Algar cutting timber on the land in question, which would be in 1852 or 1853. Coleman said 1853 or 1854. Moore said twenty-two years ago, which would be 1855. The defendant said 1852. Algar was assessed in 1848 for seventy acres.

I assume therefore that Algar, at a time not later than 1855, having a title to seventy-five acres of the land, but none to the twenty-five acres now claimed, entered into possession of the twenty-five acres as well as the seventy-five acres, and that he then cut timber upon the twenty-five acres, and forbid others from cutting on them, and that he cleared a few acres there and cultivated them, and fenced or re-fenced, or repaired the fences of the twenty-five acres,

unless perhaps, on the south side which adjoined his own south fifty acres, and that was at a period more than twenty-five years before the commencement of this suit.

I infer from the evidence also that from the time Mrs. Dingman left the land about 1840, no one entered upon it, or took possession of it until Algar entered sometime in 1849, or between that year and the year 1855.

It was contended by the plaintiff that as his action was begun before the late Act reducing the period of limitation as against a patentee whose land has been taken possession of while in a state of nature, without his knowledge, that he is entitled to the period of forty years within which to bring his action, in which case he is in time with his suit, and is therefore entitled to recover.

It was shewn at the trial that the land in dispute was in a state of nature when Algar took possession of it.

The enactment is contained in Consol. Stat. U. C. ch. 88, sec. 3, amended by 27-28 Vic. ch. 29: "In the case of lands granted by the Crown, of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some portion thereof, and in case some other person not claiming to hold under such grantee has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be shewn that such grantee or such person claiming under him while entitled to the lands had knowledge of the same being in the actual possession of such other person, the lapse of twenty years shall not bar the right of such grantee," &c. (a)

Did the grantee, Hannah Dingman, take actual possession of the lands granted to her by the Crown by residing upon or cultivating some portion thereof?

She had a grant of the north half of lot 32, containing 100 acres. She did, between 1833 and 1840, build a house upon the south-west part of the 100 acres. She cleared

(a) See Revised Statutes of Ontario, ch. 108, sec. 4.

and cultivated some land on that part of the lot, and she, with her family, resided in the house for several years. She sold first the south half of her 100 acres, and then the north-west quarter of the 100 acres, and then she left the land to join the Mormons in the United States, where she remained for many years; and although she died in this country in 1863, she never returned to the land, nor made claim of any kind to it. Her family either left the lot when she left it, or before it, and none of them have ever gone to it or made any claim to it till about a year ago, when the plaintiff's father, a son of the patentee, bought up the right of two of her daughters, who were then living in this country.

When the patentee built the house on the land granted to her, and occupied it, and cleared and cultivated the part so cleared for several years, she was, in my opinion, in the words of the statute, "in the actual possession by residing upon or cultivating some portion thereof." She had the actual possession of all the land she had the title to. She did not enter only into the part she built upon and cultivated, she entered into every part of the "lands granted" to her.

If a grant had been made to her of two different lots, I would not say, although they adjoined each other, that the entry upon one lot and taking actual possession of it was a taking possession of the other lot. There might also be some difficulty in saying whether, if the grant of a lot were made by the description of half lots, the entry upon one half lot would be the entry upon the other half lot as well, to affect the grantee by the enactment referred to. That would depend upon whether the grantee claimed to enter upon the whole lot, and exercised the like acts of ownership over it by cutting timber on it, or by selling timber from it, and the like, or by fencing it or some part or parts of it, just as other proprietors did or usually do in the like case.

While it may be difficult to say whether the grantee has taken actual possession of the whole of his granted

lands when the grant is of a large quantity, such as two or more lots, merely because he has built upon or cultivated some part of his whole grant, it is less difficult to say so, when he is the grantee of a smaller piece of land such as a single lot or a half lot, whether his building upon or cultivating "some portion thereof" is a taking of the actual possession of the whole land which has been granted to him, and that difficulty would be more and more removed by the reduction of the extent of the grant until at some particular amount of acreage it would wholly disappear.

No one can doubt that the grantee, when she built upon and cultivated a part of her 100 acres, did so as taking possession of and as the owner of her whole grant. It was not a large grant of land in those times, and it is not a very large grant now, and I think that her acts in building, clearing, and cultivating, and selling seventy-five acres of herland when she was in possession, are acts from which I may say it should be conclusively inferred against her that she had removed herself and her lands from the protection of the enactment mentioned, and placed herself and her lands under the ordinary statutory provisions which are applicable to people generally and to their lands. I fear if these acts of Hannah Dingman be not held sufficient to constitute an "actual possession" under the statute, that it will do infinite mischief to persons who may be purchasers in good faith of such lands.

I entertain no doubt myself that Hannah Dingman was not, nor are the claimants under her, entitled to set up the enactment relied upon in aid of their title.

Has the period of twenty years then run against Hannah Dingman or those who claim under her? I think it is quite certain it has. Algar was in possession after a plain "discontinuance of possession" by Hannah Dingman the owner, and he continued his possession without interruption of any kind for at least ten years, and he sold his right to the defendant, who has kept the possession without interruption for about eleven years before this action was brought. The twenty years therefore are a bar under the former law.

If fencing, clearing, cultivating, cutting timber, keeping off trespassers, and selling his right for \$10, can be evidence of anything they are evidence that Algar claimed title to the land, and that he did not limit his right to any lesser interest than the absolute ownership of the land, and the defendant has succeeded to and has purchased these rights. It is true the \$10 was a small sum, but then Algar had no other right than that of a squatter to dispose of. That right, which was of no value then, has become of great value now, because the twenty years are complete.

Then it was urged that the defendant's offer to the plaintiff of \$100, if he would give him a warranty deed, was such an admission of title that it removed the statutory bar of prescription. It is manifest the offer can have no such effect. The *paper title* which the defendant wanted may be worth to him \$100, although he has a perfect title by the statute. The title would be more marketable if a paper title could be shewn. The defendant did not by his offer give up or abandon any right he had, nor did he declare he had no right; he was proposing to acquire a further right, and for that he was willing to give the sum he offered. The offer too was after action brought, so that it could not have availed the plaintiff in this action.

The acknowledgment, too, if it be one, was not in writing, which the statute requires.

I will not go through the numerous cases which have been cited, nor the still more numerous cases which those cited refer to. I will cite only the case of *DesBarres v. Shey*, 22 W. R. 273, 29 L. T. N. S. 592, for an observation which it contains, and an important one in cases of this kind.

It is that technical disseisin of the claimant is not necessary to create adverse possession, for possession is adverse for the purpose of limitation where an actual possession is found to exist under circumstances which evince its incompatibility with a freehold in the claimant.

It is not necessary to say what share the plaintiff should

have recovered if he had established a title in his favour from two of the daughters of the patentee. It is plain he cannot recover more than these two daughters had power to grant. Simon, Jacob, Charlotte, and Mary, married. Whether they are living or not is, with the exception of Mary, who is living in McGillivray, not known. Why the plaintiff should have got a verdict for Mary's share is not clear. And although it may be presumed that Simon, Jacob, and Charlotte, are dead, it cannot be presumed, and more particularly as their marriages are spoken of, that they have died without issue. The rule is, that it is necessary for one claiming by descent to prove that the particular person, whose death opens the succession, was not married, but if there be no evidence of that fact, non-marriage will not be presumed: *Doe d. Banning v. Griffin*, 15 East 293; *Richards v. Richards*, 15 East 294, note a; *Doe d. Oldham v. Wolley*, 8 B. & C. 22. That part of the case becomes immaterial, because I am of opinion the actual right of Hannah Dingman, and of all claiming under her, is barred by the possession of more than twenty years of Elisha Algar, and of the defendant, of the land in question, and that the defendant's rule should be made absolute to set aside the verdict for the plaintiff, and to enter it for the defendant.

HARRISON, C. J., concurred.

ARMOUR, J., having been counsel in the case, took no part in the judgment.

Rule absolute.

CLEMENTSON ET AL. V. THE GRAND TRUNK RAILWAY COMPANY.

Stoppage in transitu—Insufficient notice—Bill of lading—Endorsement.

W. B. Palmer purchased goods from the plaintiffs in England, which were shipped at Liverpool, in 15 packages, in the name of M. & Co., the plaintiffs' shipping agents, as consignors, consigned to W. B. Palmer & Co., at Hamilton. These goods arrived in three different lots at Hamilton, between the 29th November and 4th December. On the 23rd November, W. B. Palmer & Co. endorsed the bill of lading to McPherson, & Co., as security for a debt, and between the 6th and 10th December, the goods were delivered to them by defendants. The plaintiffs had a branch house at St. John, N. B., which, having heard of W. B. Palmer's & Co's. insolvency, telegraphed to defendants at Hamilton, on the 5th December: "Do not deliver earthenware from our English house to W. B. Palmer & Co. Hold to our order." Signed, "Clementson & Co.," (the plaintiffs). W. B. Palmer & Co. had then about 400 pieces of goods in defendants' warehouse at Hamilton, and the plaintiffs' names were not on any of the papers in defendants' possession, nor were the packages so marked that they could be identified.

Held, that the notice was insufficient.

The bill of lading, headed "Montreal Ocean Steamship Company, Allan line, and Grand Trunk Railway of Canada," stated that the goods were to be delivered at Portland, "unto the Grand Trunk R. W. Co., and by them to be forwarded thence by railway to the station nearest to Hamilton," &c. *Held*, that this bill of lading, not having been superseded by any other document, was in force up to the time of its endorsement to McPherson & Co.; and, *Seemle*, that such endorsement, though for an antecedent debt, would defeat the right of stoppage *in transitu*.

DECLARATION. First count:—Trover.

Second count: for non-delivery by defendants as common carriers of goods which the plaintiffs delivered to the defendants, at Portland, in the State of Maine, to be carried from thence by their railway to the city of Hamilton, in this province, and there to be delivered to W. B. Palmer, & Co., or their assigns, but subject to the conditions that if before the delivery of the goods the said persons before mentioned should become insolvent, and the plaintiffs should thereupon notify the defendants to stop the delivery of the goods, and to hold the same to the plaintiffs' order that the delivery of the goods should be so stopped, and the same should be held by the defendants, subject to the order of the plaintiffs, and be delivered by the defendants

to the plaintiffs, or their order, and not otherwise, and that the defendants received the goods for the purposes and on the terms aforesaid. The count then averred W. B. Palmer & Co.'s subsequent insolvency; and that the plaintiffs did, while the defendants still held the goods, and before they had delivered the goods to W. B. Palmer & Co., notify the defendants not to deliver the goods to W. B. Palmer & Co., or their assigns, but to hold the goods to the plaintiffs' order. Breach.

Pleas: 1. To first count: Not guilty. 2. To first count: Goods not plaintiffs.

3. To second count. The plaintiffs did not deliver the goods to the defendants, nor did the defendants accept or receive them from the plaintiffs upon the terms and conditions, or in the manner and form in the second count mentioned and alleged.

4. To second count. That before the delivery of the goods to W. B. Palmer & Co., they had not become insolvent.

5. To second count: Before the delivery of the goods by the defendants to W. B. Palmer & Co., and while the defendants were in possession of the goods, the plaintiffs did not notify the defendants not to deliver the goods to W. B. Palmer & Co., or their assigns, and to hold the goods for the plaintiffs, as alleged.

6. To second count: That ample time did not intervene between the receipt by the defendants of the notice, and the delivery by the defendants of the goods to W. B. Palmer & Co., to enable the defendants to stop the delivery of the goods to W. B. Palmer & Co., or their assigns, as alleged.

7. To second count; That the defendants did not deliver the goods as in the second count alleged.

Issue.

The cause was tried at the Chancery sittings, at Hamilton, last spring, before Blake, V. C., without a jury.

The evidence was to the effect that W. B. Palmer, upon this single occasion made a purchase of goods from the plaintiffs, in England, of the value of £99 18s. 10*d.* sterling,

consisting of twelve crates and three casks. They were shipped at Liverpool, on the 8th of November, 1876, by the plaintiffs' shipping agents, Thomas Meadows & Co., and the bill of lading was in the name of the shipping agents, as consignors; the goods being consigned to W. B. Palmer & Co., or their assigns, at Hamilton. On the 21st of November, the way bill of goods for Hamilton, which had been brought out by the Allan steam ship "Peruvian," was made out at Portland, and there appeared on it fifteen packages of merchandise for W. B. Palmer & Co., of Hamilton.

On the 23d of November, the way bill from Portland to Hamilton, of two casks and eleven crates, was made out; and these goods arrived in Hamilton, and advice was given to W. B. Palmer & Co. of their arrival on the 29th of November.

Another way bill of the like kind was dated at Portland, on the 24th of November, of one crate for W. B. Palmer, which arrived at Hamilton, and advice of such arrival was given on the 30th of November.

A third way-bill of the 27th or 29th of November, was for one cask, which arrived in Hamilton, and advice was given of such arrival, on the 4th of December.

About the 23rd of November, McPherson & Co., being creditors of W. B. Palmer & Co., got as collateral security for their debt an endorsement of the bill of lading to them, of which they advised the defendants on the 16th of December, and the fifteen packages were between the 6th and 10th of December, delivered by the defendants to McPherson & Co.

The plaintiffs had a branch of their business or house in St. John, New Brunswick, and W. B. Palmer & Co. being in insolvent circumstances, telegraphed from Hamilton to St. John, to the plaintiffs' house there, on the 5th of December, "detain your goods at Grand Trunk here immediately, trouble here." The house at St. John on the same day telegraphed to the defendants at Hamilton, "do not deliver earthenware from our English house to W. B. Palmer & Co.—hold to our order." "Clementson & Co." And

they wrote a letter on the 5th of December from St. John to the defendants at Hamilton, which was received there on the 9th of that month.

The contest at the trial was whether, assuming W. B. Palmer & Co. had still been the holders of the bill of lading, the notice given by the plaintiffs' house at St. John, to the defendants at Hamilton, was sufficient or not? W. B. Palmer & Co. had then about 400 pieces of goods in the defendants' warehouse at Hamilton, and it was said they could not tell the packages of "earthenware from our English house to W. Palmer & Co." Signed "Clementson & Co.," because there were no papers or documents of any kind with Clementson & Co.'s name on them, and the packages were not so marked that they could be identified. It was urged by the plaintiffs that the ship's manifest, which was used as the way-bill from Portland to Hamilton of all goods which arrived from England by the "Peruvian," to be sent to Hamilton, gave the numbers of the pieces of merchandize which had been sent for W. B. Palmer & Co., making fifteen in all—and that as "earthenware from our English house," was spoken of, English shipped goods could be identified from others, and if they could not, that it was the duty of the defendants to have applied for further or better information respecting the identity of the goods; and as they did not do so, that they were liable for the giving up of the goods to the assignee of the bill of lading.

The defendants' freight agent when he got the telegram from St. John, looked at all the papers he had in the office—the way-bills, the bill of lading, and books, but not at the packages; and the goods in question he said were the only goods which the defendants had which had come by bills of lading, and he knew they came from England by the Allan Line to W. B. Palmer & Co., but he said ether goods of the same person might have come from England through the United States, in bond.

The learned Vice Chancellor expressed himself to the following effect, upon giving his verdict for the defendants:—

"It is perfectly clear that it was the duty of the Grand Trunk Railway Company, apart from any right the plaintiff had, to deliver these fifteen cases of goods to the person to whom the goods were consigned, or to any person to whom the bill of lading had been transferred. These packages had been assigned to McPherson, who claimed them. The telegram was received from the firm at St. Johns, N. B., with instructions to the Grand Trunk to detain the goods from our "English house." At the time this telegram was received, the Grand Trunk Railway Company had in store four hundred packages of goods addressed to W. B. Palmer. And because they did not ransack all these four hundred packages in order to discover which of them answered to a general telegram of that description, it is said they are liable. Was it the duty of the Grand Trunk Railway Company to do anything at all on a notice of that kind? I take it that the notice must give a reasonable description of the property—who the person is that is to receive it, and everything by which the property which is the subject of the notice, can be fully identified. So far as the description given by that paper goes, it is out of the question to say that any person with certainty could go in a warehouse where there were four hundred packages consigned to the same person, and select from that number fifteen packages, as being the goods referred to in that notice. The information the Grand Trunk Railway Company had was that which might mislead them. The goods were consigned by a person or firm named Meadows, of Liverpool, of whom they knew nothing. There was nothing to shew that the packages sent by Meadows were those referred to in the notice received, but rather one would come to the conclusion that they were goods not then in the warehouse, but goods which were to be received. We find, too, that during the days intervening from the 4th of December to the 9th and 10th of December, the agent at St. Johns had presented no claim for the goods. The question was, whether the company were justified in giving the goods

to the person who held the bill of lading, or should suffer an action to be brought against them for detention of the property, thinking that something might turn up out of this imperfect notice. It would be impossible for any firm or company to maintain the carrying business if, on receiving a general statement from a person they had no knowledge of, whose name did not appear on the bill of lading, or the shipping bill, that a man in England made a claim on these fifteen packages, the company was to stay dealing with the four hundred packages until he chose to investigate them. The notice was insufficient, and so much waste paper, and the company was not bound to regard it, and there must be a verdict for the company. The company is bound to exercise reasonable diligence in endeavouring to discover the goods, but so also is the plaintiff.

"If the Railway Company had possessed any knowledge which, coupled with the notice received, would have enabled them to lay their hands on the goods, I would have found them liable to the plaintiff in damages. Not having that information, I do not think they are liable.

"Verdict for defendants, with costs."

During Easter Term, May 25, 1877, *MacKelcan*, Q.C., obtained a rule calling upon the defendants to shew cause why the verdict should not be set aside, because it was contrary to law and evidence, and because sufficient notice was given by the plaintiffs to enable the defendants to stop *in transitu* the goods in question in this cause if they had used reasonable diligence, and because the defendants wilfully or negligently disregarded the notice given to them; and why the verdict should not be entered for the plaintiffs for the value of the said goods.

During this Term, November 24, 1877, *McMichael*, Q. C., shewed cause. The bill of lading having been assigned by the vendees of the goods to McPherson & Co., on the 23rd of November, 1876, and notice having been given by the endorsees of it to the defendants before the

plaintiffs' telegram of the 5th of December was received by them, the property in the goods passed to the endorsees, and the right of stoppage of the vendors was determined: *Whitehead v. Anderson*, 9 M. & W. 518; *Russell on Mercantile Agency*, 2nd ed., 182; *Leask v. Scott*, L. R. 2 Q. B. D. 376. Besides, the notice of stoppage given to the defendants was so indefinite, that they could not, if they had known that fifteen packages were all that were wanted, have told which of the fifteen out of four hundred packages were referred to. They were not told how many packages to stop, nor were they in any way described. They were directed merely to stop "the earthenware from our English house to W. B. Palmer & Co.," and it was signed by "Clementson & Co.," whose name did not appear in the bill of lading, or in any other document. Nor had the defendants knowledge or information of any kind from any one what these goods were, or how they could be identified, by marks, numbers, or otherwise. And it was not their place to go about seeking for information; nor to telegraph or write about the goods. It was the duty of the person who claimed the right to stop the goods, to describe them so plainly that the defendants should know exactly what it was that was wanted of them.

MacKelcan, Q. C., supported the rule. It was the duty of the defendants to make reasonable and proper enquiries to give effect to the notice which had been sent to them. But if they cannot be required to take such means, they had the means in their own power to distinguish the goods which were claimed from all the other packages which they had belonging to W. B. Palmer & Co. They examined the bills of lading, the way bills, and their own books, and if they did not find the names of Clementson & Co. in any of them, they did know that the goods desired to be stopped were from England, and they knew the precise fifteen packages which came from England by the Allan line, and for which goods there was a bill of lading, and the ship's manifest, or a copy of so much of it as related to

goods for Hamilton, including the goods in question; and they knew also there were no other goods in their possession for W. B. Palmer & Co., but those in question, for which there was an English bill of lading. And they had the packages themselves to look at, but they did not examine them. There was evidence that the goods could have been found if the defendants had chosen to look for them. There was evidence that they did not take any trouble about the notice, because they did not know who Clementson & Co., were. And there was evidence that they knew the identical goods, because it was shewn that the defendants' officers said they were the goods which several parties were fighting about, and about which they had so much trouble that they would not take any more trouble with them. Here no title passed by the endorsement of the bill of lading, for its office was fulfilled when the goods were landed from the ship. The property in goods is not dealt with by the marine bill of lading, when they are after landing being carried by railway: *Smith's Mercantile Law*, 8th ed., 302. The goods were carried from Portland to Hamilton by a carriers' receipt, or way bill, and such a document is not a bill of lading, nor transferable as one. The endorsement of the bill of lading to McPherson & Co., if it could then be made as a subsisting instrument, was invalid, because it was given not for a new consideration, but for an antecedent debt, and only as collateral security: *Cockburn v. Sylvester*, 1 App. 471; *Rodger v. Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393; *Cuming v. Brown*, 9 East 506; *Benjamin on Sales*, 2nd ed., 715; *Whitehead v. Anderson*, 9 M. & W. 478; *The Tigress*, 8 L. T. N. S. 117, 11 W. R. 528.

December 28, 1877. WILSON, J.—I think the notice of stoppage is insufficient which was given by Clementson & Co. to the defendants to stop the goods. It did not specify the goods by marks, numbers, or otherwise. The name of Clementson & Co. did not appear in the bill of lading, or in any of the documents which were in

the possession of the defendants; and if they were bound—which I do not think they were—to know that the plaintiffs' goods which they had sold to W. B. Palmer & Co. were among the fifteen packages of goods which came from England by the steamer, from the mere fact that the telegram mentioned "earthenware from our English house," still they were not told to stop all these fifteen packages, nor how many of them if less were to be stopped; and the defendants had no knowledge or means of finding out definitely what it was they were to do. It is certain they could not be required, at their own peril, upon such insufficient instructions, to seize the whole fifteen packages, nor even any particular number of them; and it became far more embarrassing to them when there were about 400 packages then in store for W. B. Palmer & Co., many of which might, besides the fifteen, have come from England by the way of New York.

The next point is, that before the notice to stop arrived on the 5th of December, the bill of lading had been endorsed by W. B. Palmer & Co., to McPherson & Co., who had given notice of it to the defendants.

It was contended by Mr. MacKelcan that the transfer of it was of no effect, because its purpose had been answered by the landing of the goods, and it no longer had operation as a symbol of property.

That is not a correct view of the law, as appears from *Meyerstein v. Barber*, L. R. 2 C. P. 38. I will quote only one passage of the many that might be quoted for that purpose. "Does a bill of lading cease to have any operation or vitality when the goods are landed, even though they are remaining at the wharf where they were landed by the master as security for the freight? I am of opinion that is not the true effect of such a transaction. I think the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it. I believe that will be found not only to be the law, but also to be in accordance with the convenience

and the practice of carriers and merchants :” Per Willes, J., at p. 53. It was affirmed in the Ex. Ch., in the same vol. p. 661.

That case does not decide that the bill of lading continues to be operative throughout a long railway transit after the goods have been landed from the ship, but the principle of the decision applies. The bill of lading is still a symbol of property until it has been superseded by performance of its conditions, or by its supersession by some other instrument being delivered to the vendee in lieu of it.

This bill of lading is headed “Montreal Ocean Steamship Company, Allan Line and Grand Trunk Railway of Canada.” It then states that the goods are to be delivered at Portland “unto the Grand Trunk Railway Company, and by them to be forwarded thence per railway to the station nearest to Hamilton, and at the aforesaid station delivered to Messrs. W. B. Palmer & Co., or their assigns, freight, primage, and charges for the same goods payable by consignee as per margin”; and then it concludes: “In witness whereof the Agent of the said Railway and Steamship Company hath affirmed to three bills of lading,” * * for Grand Trunk Railway Company of Canada, and Montreal Ocean Steamship Company. ALLAN H. LUCAS, Agent.”

It is plain that the ocean and inland carriage were and are covered by the same document of title, and convenience and custom alike support the continuing effect of the original shipping document until the journey contemplated has been completed, unless, as before stated, it has been superseded by some other document.

Nothing of that kind was done here, and I have no difficulty in holding that the bill of lading was in full force up to the time of the endorsement of it to McPherson & Co., on the 23rd of November, at which date the freight and charges were still unpaid upon the goods, and neither the vendees nor their assignees could have got them without the payment of such claim. And then, and at Hamilton, W. B. Palmer & Co., or their assigns were to receive the goods under that bill of lading.

It was next objected that the transfer of the bill of lading to McPherson & Co. was not binding, so as to exclude the right of stoppage by the unpaid vendors, because there was no new consideration given for the transfer, and it was given as collateral security for the payment of a then existing antecedent debt. And the case of *Rodger v. Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393, was cited by Mr. MacKelcan, as an authority for that proposition, and it is an authority in point.

The later case of *Leask v. Scott*, L. R. 2 Q. B. D. 376, cited by Dr. McMichael, expressly dissented from it. The decision was in the Court of Appeal, before Lord Coleridge, C. J., and Bramwell and Brett, L.JJ. The head note is "The transfer of a bill of lading for valuable consideration to a *bonâ fide* transferee defeats the right of stoppage *in transitu* of the unpaid vendor of the goods, although the consideration was past and not given at the time the bill of lading was handed to the transferee by the lawful holder;" and the judgment pronounced establishes it.

I have not considered whether if the plaintiffs' notice of stoppage of the goods had been sufficient, the plaintiffs could have got the priority over McPherson & Co., if the endorsement to them was over-reached by the actual insolvency of W. B. Palmer & Co., and if the plaintiffs' notice, assuming it to have been sufficient, had given them the priority over the assignee in insolvency.

I have not considered it because no such point was raised, and because I am of opinion the notice was not sufficient, although before the assignee got the goods from McPherson the defendants had received Clementson & Co.'s letter of the 5th of December.

The letter added nothing to the force of the notice. What conversation may have taken place between the parties as to the identification of the goods before the assignee in insolvency actually got them from McPherson & Co., I am not able to say, for there is nothing in the evidence specific upon that point. That, too, would be matter for consideration in a suit with others than the

defendants, as parties, for if they gave up the goods, as no doubt they did, so far as I can judge from the evidence, in good faith to the transferees of the bill of lading, and without any notice of the insolvency of W. B. Palmer & Co., they did all that was incumbent upon them.

I am of opinion that the rule should be discharged.

HARRISON, C. J., concurred.

ARMOUR, J., was not present at the argument, and took no part in the judgment.

Rule discharged.

VANSICKLE ET AL. V. KELLY.

Will—Construction—Provision for the use of a lane—Right to remove gate.

A testator devised part of lot 17 to his son Charles, and part of lot 18, adjoining it to the east, to his son William, adding that, in order to give Charles free access to and from the side road on the east side of lot 18, the lane or road "now running across" the land devised to William, "commencing at my gate on said side road," and in width half a chain, to the west limit of 18, should be kept open for the free use of his said sons, with a proviso that should the whole estate bequeathed to them come into the possession of any one person, this provision, "in reference to the continuance of said lane or road," should become void. *Held*, that the testator evidently intended that the lane should be continued as then existing and used; and that the defendant, claiming under Charles, had no right to remove the gate on the side road.

TRESPASS, *quare clausum fregit*, to part of lot 18 in the first concession of the township of Ancaster.

Pleas: not guilty; leave and license; Statute of Limitations; and a special plea, to the effect that long before the alleged trespass one John Harris Wilkins, being then seized in fee simple of the land in the declaration mentioned, and of certain other land, now the property of the defendant, by his will duly executed so as to pass real estate, devised to one Charles Wilkins the land, now the land of the defendant; and for the more convenient occupation and enjoyment thereof a right of way on foot and with cattle, horses, and carriages, from a certain public highway, being the side road, on the east side of the plaintiffs' land, over a certain lane then known as the lane of

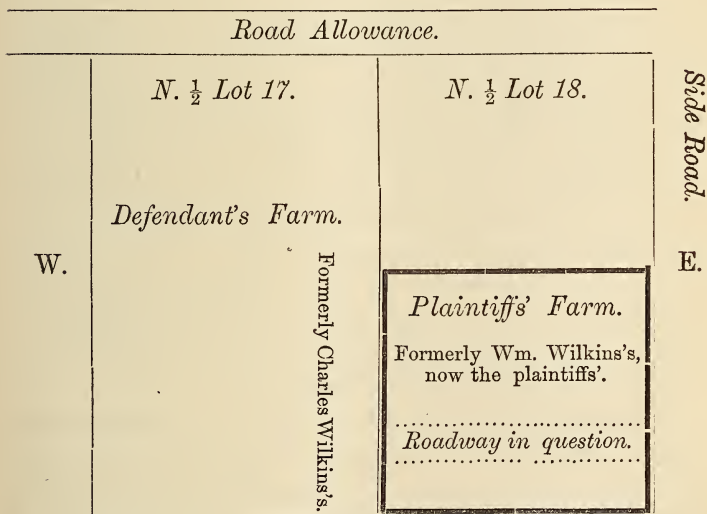
the said John Harris Wilkins, in width half a chain, and running parallel with the concession lines across the said land of the plaintiffs as far as the west limit thereof, as a means of free ingress and egress at all times of the year to and from the said highway; and the said Charles Wilkins subsequently, by his deed, granted to the defendant the said land and the said right of way, and the defendant entered into and took possession of the said land, &c., by virtue whereof the defendant was at the time, &c., entitled to the said right of way, &c., and the alleged trespass was the removal of an obstruction put across the said way, &c.

Issue.

The cause was tried at the last Hamilton Assizes, before Galt, J., without a jury.

The subjoined plan of the north halves of 17 & 18, shews the situation of the land owned by the respective parties, and of the lane in question:—

N.



S.

It was admitted that the lands now owned by the plaintiffs and defendant respectively, were at one time owned

by John Harris Wilkins in the plea mentioned, and were disposed of by his last will.

By the will he gave to his son Charles, his heirs and assigns forever, the north half of lot No. 17, in the 3rd concession of Ancaster, containing one hundred acres, more or less, subject to a payment in money to be made to his son William; and unto William, his heirs and assigns forever, gave the south half of the north half of lot No. 18, in the same concession of Ancaster, containing fifty acres, more or less.

In the will followed a clause about which the difficulty in this case has arisen between the parties. It was as follows:—"In order to render it convenient for my son Charles, his heirs and assigns, to obtain free access to and from the side road on the east side of my estate, it is my will that the lane or road now running across that portion of my estate hereinbefore given and bequeathed unto my son William, and described as follows, that is to say: commencing at my gate on said side road, and in width half a chain, and running parallel with the concession lines across said lot No. 18 as far as the west limit of the said lot, said lane or road shall be kept and remain open for the free use of my said sons, Charles and William, their heirs and assigns. Provided always, that if at any time hereafter the whole of the real estate hereinbefore bequeathed unto my sons Charles and William shall come into lawful possession of any one person, by virtue of any deed or conveyance of any kind, entitling such person to the freehold possession of said real estate, then the foregoing provision of my will in reference to the continuance of said lane or road shall become null and void."

It was admitted that the plaintiffs were the owners in fee of the north half of lot 18 in the 3rd concession of Ancaster, devised by the will to William Wilkins, and that the defendant was the owner in fee simple of the north half of lot 17 in the 3rd concession of Ancaster, devised by the will to Charles Wilkins.

It was also admitted that at the time of the making of

the will, and at the time of the death of the testator, and at the times when the plaintiffs and defendant acquired title to the respective lands, a gate was erected at or near the entrance of the lane in the will mentioned, and which required to be opened from time to time to obtain access from the lane to the side road.

It was further admitted that before action the gate was removed by the defendant, claiming that it was an obstruction to the free use of the lane: that a second gate was erected at the same place by the plaintiffs; and that it was also removed by the defendant, claiming that it was an obstruction to the free use of the lane, and it was assumed that the second gate was erected in the same position as the first gate.

The removal of the second gate was the trespass in respect of which the action was brought.

The learned Judge entered a verdict for the plaintiffs, with twenty cents damages.

During this term, November 20, 1877, *Robertson*, Q. C., obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside and a verdict entered for the defendant, on the ground that the verdict was contrary to law and evidence in this, that the trespass complained of was the removal of an obstruction put across the roadway by the plaintiffs, and that the defendant was entitled to have the said roadway kept open for the free use of himself, his heirs and assigns.

During the same term, November 30, 1877, *Osler*, Q. C., shewed cause, and cited *Heward v. Jackson*, 21 Grant 263; *Pyer v. Carter*, 1 H. & N. 916; *Harris v. Ryding*, 5 M. & W. 60; *Wardle v. Brockhurst*, 1 E. & E. 1058; *Goddard on Easements*, 2nd ed., 247; *United Land Co. v. Great Eastern R. W. Co.*, L. R. 10 Ch. 586; *Cousens v. Rose*, L. R. 12 Eq. 366; *Clifford v. Hoare*, L. R. 9 C. P. 362; *Harding v. Wilson*, 2 B. & C. 96; *Squire v. Campbell*, 1 M. & Cr. 459.

Robertson, Q. C., contra, cited *James v. Hayward*, Sir W. Jones 221; *Phillips v. Treeby*, 8 Jur. N. S. 711; *Pomfret v. Ricroft*, 1 Saund. 32; *Gale on Easements*, 5th ed., 7.

December 28, 1877. HARRISON, C. J.—The testator by his will did not create a new way, but was dealing with a way with which he was familiar, and which in his life time he had used as appurtenant to lot 17, the land of the defendant.

His purpose in making any reference to the way was to render it convenient for his son Charles, to whom he had devised lot 17, to obtain free access to and from the side road to the east of lot 18, a part of which he had devised to his son William, under whom the defendant claims.

He speaks of the way as “the lane or road *now* running across” that portion of his estate devised to William, and in particularly describing it commences at the “gate” on said side road, giving it a width of half a chain, and running parallel with the concession line across lot 18.

His declaration is, that the lane—that is, the lane with the gate on it—shall be kept and remain open for the free use of his sons Charles and William, their heirs and assigns.

In the event of one person becoming the owner of both lots, his will is that the provision in reference to the “continuance” of the lane, shall be null and void.

We are of opinion that the testator did not intend to make any change in the lane. On the contrary, we are of opinion that his intention was that the lane—that is, the then existing lane—in other words, the lane with the gate on it—should be *continued* for the use of both lots so long as both lots were possessed by different proprietors.

While it was in this state, it was in a sense “open” for his own “free use,” and in this sense, and in no other, we think he intended it should “be *kept* and *remain* open” for the use of his sons, their heirs and assigns.

We cannot say, when we look at the surrounding circumstances, that the intention of the testator admits of any doubt.

It is our duty, upon the construction of such a will, to have regard to the surrounding circumstances, in order, as

nearly as possible, to place ourselves in the situation of the testator, and from that situation put a meaning upon the words he has used.

So long as the gate is not locked, and no additional obstruction is placed on the way, the user is as open and free as it was for the testator himself.

The nature of the enjoyment of an easement at the time of the grant thereof, is the proper measure of enjoyment during the continuance of the grant: *Heward v. Jackson*, 21 Grant 263.

The defendant, in our opinion, was not justified in removing the gate.

The rule must be discharged.

WILSON, J., concurred.

ARMOUR, J., was not present at the argument, and took no part in the judgment.

Rule discharged.

RE CHAMBERLAIN AND THE CORPORATION OF THE UNITED COUNTIES OF STORMONT, DUNDAS, AND GLENGARRY.

High schools—Mode of assessment—37 Vic. ch. 27, 36 Vic. ch. 48.

The three united counties of Stormont, Dundas, and Glengarry were formed into five high school districts. *Held*, that under 36 Vic. ch. 48, sec. 383, sub-sec. 6, and 37 Vic. ch. 27, sec. 45, O., the aid granted by the corporation to the high schools to supplement the government grant, must be by an equal rate upon the assessable property of the united counties, not upon each high school district for the sum apportioned to its schools.

SEPTEMBER 25, 1877, *J. E. Rose* obtained from Wilson, J., sitting for the full Court in vacation, a rule *nisi* calling on the corporation to shew cause why a by-law of the said corporation, for the support of high schools in and for the said united counties, should not be quashed, with costs, on the following grounds:—

1. That the said by-law does not shew whether it has been passed to levy a yearly rate, or to create a debt.

2. The by-law, if passed to levy a yearly rate, does not provide for the levying and collecting of a rate of so much in the dollar upon the assessed value of the property in the municipality.

3. The by-law, if passed to create a debt, does not contain the recitals and provisions required by 36 Vic. ch. 48, sec. 248, O.

4. The by-law, if it discloses any mode of assessment, discloses an arbitrary mode of assessing upon each county a sum equal to the amount to be paid to the said county, which is not authorized by any statute.

5. The by-law does not disclose any mode of assessment, &c.

The by-law enacted as follows:—"That the following sums from the several counties hereinafter mentioned, viz.,

County of Stormont	\$580 00
County of Dundas	972 50
County of Glengarry	869 50"

The by-law then apportioned these sums among the local municipalities in each county, "be paid to the several high schools as follows," *i.e.*, the school or schools in each county, the sum raised in that county.

The only question was, whether the mode of assessing provided by the by-law, viz., by counties, was correct, or whether, as the applicant urged, the assessment should be an equal rate upon the whole assessable property of the united counties.

November 20, 1877. The motion was argued before Gwynne, J., sitting alone.

Bethune, Q. C., shewed cause,

J. E. Rose supported his rule.

December 4, 1877. GWYNNE, J.—By 36 Vic. ch. 48, sec. 383, sub-sec. 6, O., it is enacted that the council of every county, &c., may pass by-laws "For making provisions in aid of such high schools as may be deemed expedient."

By the 45th section of 37 Vic. ch. 27, O., it is enacted that "In the case of a high school in a town not withdrawn

from the county, or in an incorporated village or township, one half of the amount paid by the Government, shall be paid by the municipal council of the county in which such high school or collegiate institute is situated, upon the application of the high school board; and such other sums as may be required for the maintenance and school accommodation of the said high school, shall be raised by the council of the municipality in which the high school is situated, upon the application of the high school board; or in the event of the county council forming the whole or part of a county into one or more high school districts, then such other sums as may be required for the maintenance of the said high school shall be provided by the high school district, upon the application of the high school board."

Then the 46th section enacts that "The council of any municipality, or the councils of the respective municipalities out of which the whole or part of such high school district is formed, shall, upon the application of the high school board, raise the proportion required to be paid by such municipality or part of the municipality, from the whole or part of the municipality, as the case may be."

I think it is plain that the Legislature has in these clauses drawn a distinction between the amount referred to "as one half of the amount paid by the Government," and "such other sums as may be required," the former of which is charged as a debt upon the general county constituting the municipality in which the high school is situated, and the latter upon the school districts respectively. Now, in the case before me, the county municipality is that of the united counties of Stormont, Dundas, and Glengarry, and, as is admitted, there are within this county five several high school districts; therefore all moneys representing the half of the Government grant to these several high schools is a charge upon the county municipality, and having regard to the 258th section of 36 Vic. ch. 48, O., and the 74th section of 32 Vic. ch. 36, O., the amount required for the equivalent to half of the Government grant to the above for high

schools, must be levied by an equal rate upon the whole assessable property in the municipality constituting the county of the united counties of Stormont, Dundas, and Glengarry. This appears to me to be the true construction of the statute, although I confess that the view taken by the council, to charge the half of the Government grant to each of the high schools upon the ratable property in each of the high school districts respectively, is the most just and equitable mode of levying the required amounts.

The 248th section of 36 Vic. ch. 48, does not, in my judgment, affect a by-law for the purpose of levying a rate of this nature.

In the view which I take I regret to feel obliged to order that the by-law be quashed, and with costs.

Rule absolute.

BENSON V. THE OTTAWA AGRICULTURAL INSURANCE COMPANY.

Insurance—Conditions—Warranty—Concealment of material fact—Situation of adjoining buildings—Survey made by defendants' agent—Non-payment of note for premium—Estoppel.

A policy on four dwelling houses provided that all statements contained in the application, which must be in writing and signed by the applicant or by his authority, would be taken to be warranted by the assured, and "if any misrepresentation or concealment of facts has been made in the application, or if he (the applicant) shall in any manner make any attempt to defraud this Company, the policy shall be void." The defendants in their plea, after setting out this condition, alleged that the insured concealed from them the fact that the insured premises were near to and immediately opposite to a blacksmith shop, which fact was one material for the consideration of the risk attending the application; and that by reason of such concealment the policy became void.

At the foot of the application it was agreed that the survey and diagram should form a part of the contract, and that if the agent of the company filled up the application he should in that case be the agent of the applicant, and not of the company.

It appeared that in answer to a question in the application "External exposures. What is the distance, occupation, and materials of all buildings within one hundred feet?" the distance of certain buildings from those insured was stated, and a sketch was given on the back

shewing their position. The insurance was effected through the defendants' agent, who with the husband of the insured measured the distance from the other buildings, and told him that it was unnecessary to put in a blacksmith's shop on the other side of the street, eighty-six feet distant.

Held, WILSON, J., dissenting, that the plea was not proved, for the defence was not put upon the ground of warranty, but on the concealment of a material fact; and according to the evidence there was no concealment, nor was the blacksmith's shop material to the risk. Per WILSON, J., the plaintiff was bound by the application, and it must be inferred that the fact was material and was agreed to as such by the parties.

Another condition was, that where credit was given and a note taken for the premium, unless the same should be paid at maturity the policy should be void. And the defendants set up non-payment as a defence under this condition.

The insured and her husband gave the agent a note for the premium, payable in three months. The agent left the application with the husband, telling him, as he was in a hurry, to sign his (the agent's) name to it, and send it to defendants, which the husband did, with a letter, asking defendants to let him know when the note came due. They acknowledged it, and sent the policy to him. The day after the note fell due the husband wrote to defendants asking if they held the note, and if the policy was good without being countersigned by the agent. In answer defendants' secretary wrote on the 8th March (saying nothing about the policy), that the agent was an impostor, that, "we are trying to get on his track, and may be able to write you further on this subject again. Your note never came here, and I advise you not to pay it whoever should call on you for the same." The fire took place in September. After some correspondence, defendants in December refused to pay, giving, for the first time, as one reason the non-payment of the note; and the Secretary at the trial swore that the note not having been paid they considered the policy cancelled when they wrote on the 8th May. *Held*, that defendants were clearly estopped by that letter from setting up this defence.

ACTION on a fire policy, granted by the defendants to Christina Stephens on 31st January, 1876, to the amount of \$1,100, for three years, on certain buildings on lot 3 on Huron and Temperance streets in the town of Seaforth—that is, on dwelling-house No. 1 \$200, on dwelling-house No. 2 \$250, on dwelling-house No. 3 \$400, on dwelling-house No. 4 \$250, as described in the application for insurance, and forming part of the policy. The loss, if any, by the policy to the extent of \$700 to be payable to the plaintiff. The defendants, it was averred delivered the policy to the plaintiff who was then, and from thence up to the loss by fire, interested in the insured premises as mortgagee to the extent of \$700, as aforesaid. The declaration then alleged loss by fire to the extent of \$700.

Pleas. 3. Setting out the following condition:—"All

applications for insurance must be made in writing, and signed by the applicant or by his authority, and all statements contained in the application will be taken and deemed to be warranted on the part of the assured. * * If any misrepresentation or concealment of facts has been made in the application, * * or if he shall in any manner make any attempt to defraud this company, the policy shall be void." And the defendants say that Christina Stephens concealed from the defendants the fact that the said insured premises were situate near to, and immediately opposite to, a blacksmith shop, which fact was one material for the consideration of the risk attending the said application for insurance; and by reason of such concealment the policy became, and was, and is void.

4. Setting out a condition of the policy: "The premium is due and payable on the signing of the application, but when credit is given for a period not exceeding three months, and a promissory note taken therefor, the policy shall be valid and in force during the currency of such note, but unless the same shall be paid at maturity, the policy shall forthwith become null and void, and the company will not be liable for any loss that may occur." And the defendants say that on the application for insurance credit was given to Christina Stephens for three months from the date of the application for the premium then due and payable in respect of the insurance, and a promissory note was given by her for such premium, but she did not pay the said note at maturity, and by reason thereof the policy became and was and is void.

There were several other pleas, which are not material to this report.

Issue was joined on the third plea.

Replication to the fourth plea on equitable grounds: that Christina Stevens, before the loss, offered to pay the defendants the amount of the promissory note upon production of it, which was payable to Robert Blackburn or bearer, but the defendants were unable to produce it, and they informed her that she should not pay it to any person other

than the defendants, and that she need not pay it until the defendants should demand the value, by reason whereof the defendants should not be permitted to plead the non-payment of the said note as a defence to this action.

Rejoinder to the equitable replication: that the promissory note had matured prior to the happening of the loss by fire, and it was not paid either before or at maturity to the defendants, or to any one on their behalf, or to any holder of it, nor was any payment made on account of it, nor was any tender of payment of the amount of it, or of any part thereof, made by Christina Stevens before or at maturity to defendants, or to any one on their behalf, or to any holder thereof; and in consequence thereof, and by virtue of the condition of the policy mentioned in the fourth plea, the policy became and was immediately after the maturity of the note and non-payment thereof, and has ever been and still is absolutely null and void, and of no effect in law or equity whatsoever; and the defendants always treated and considered the said policy as void from the time of its maturity and non-payment up to the time and since the happening of the said loss.

Issue.

The cause was tried at Stratford, at the last Spring Assizes, before Galt, J., without a jury.

The application as to the proximity of buildings was as follows:—"External exposures. What is the distance, occupation, and materials of all buildings within — hundred feet? No. 1. Within 12 feet of house owned by T. Downey, No. 2. 20 feet from No. 1. No. 3. 16 feet from No. 2. No. 3. 23 feet from No. 4. No. 4. 60 feet from house owned by J. Walsh."

At the foot of the application it was stated that "the applicant is requested to answer the above questions fully, as it is expressly agreed on the part of the application that this survey, as well as the diagram of the premises, shall form a part and be a condition of this insurance contract. It is further agreed that if the agent of the company fills up the application, he will, in that case, be the agent of the applicant, and not the agent of the company."

The diagram made no mention of the blacksmith's shop. It was not one of the buildings described upon it as No. 1, 2, 3, 4.

The policy also made the application and survey a part of the policy.

The evidence shewed that the insurance was made through John W. Ferguson, as the defendants' agent. Thomas Stephens, the husband, and Christina Stephens gave their note, at three months, for \$16.50, the amount of the premium to Ferguson, the defendants' agent, and \$1.50 in cash. The fire began nearly two blocks from the buildings insured. The husband said he did not live in any of these buildings, and the house he lived in was burned also, and he lost some of his papers, and he said: "There were other buildings within 100 feet of the fire. They were not put in because the agent told me they were not required. I knew they were there. I asked him particularly about it, and he said they were not required to be put in. There was a hotel and stable near. I think it was about 100 feet. There was a livery stable within 50 feet. There was a blacksmith's shop on the other side of the road, 86 feet on the opposite side of the street. I asked Mr. Ferguson if that building should not be in. He said no. I swear positively to that. I thought it was right to answer in that way. I did not know any difference. I think I signed the application two or three days after I gave Ferguson the note. I did not pay anything on the note. I paid Ferguson \$1.50 his fees on the policy. The application is in my hand writing. I suppose I filled it up according to Ferguson's directions. I put in what I thought right. Ferguson made a survey of the premises and a plan which I had copied on the application. I expected he was coming again. He told me to enclose it and send it. I wanted to see if he would come and sign it himself. I thought it a strange way of the agent. I signed as agent for my wife. I was acting as her agent. I signed Ferguson's name also. He said he was in a hurry, 'you sign my name and send it down.' I did not ask his reasons. Ferguson said there was no necessity for

mentioning the blacksmith's shop. They had different rates he said. The rate that was insured under was under 60 feet he said. It was 86 feet to the blacksmith's shop, and it was not directly opposite the buildings at all. I held one end of the tape line when he measured the distance."

On the 3rd of February, 1876, Thomas Stephens wrote to the defendants, sending the application, and saying he had given the premium note to Ferguson, and informing them he had signed Ferguson's name to the application, and saying "when note comes due let me know, and I will remit."

On the 5th of February the defendants acknowledged the receipt of the preceding letter and application, and they returned the application for amendment.

The policy was at length sent by the defendants on the 14th of March to Benson and Meyer, Attorneys, of Seaforth.

On the 4th of May Thomas Stephens wrote to the defendants, of which the following is a copy :—

"I sent application for insurance which was taken by one John Wesley Ferguson, and gave him a note for the premium at three months. The time has expired for the note to be paid. Do you hold the note or not. And also inform me if the policy is good without the agent countersigning it. I also see bills posted up warning the public against insuring with the said J. W. Ferguson, as it would not be good. Hoping to hear from you."

The defendants' secretary wrote on the 8th of May the following answer :—

"I have yours of the 4th inst. This man Ferguson is an impostor, and we are trying to get on his track, and may be able to write you further on this subject again. Your note never came here, and I advise you not to pay it, whoever should call on you for the same."

The fire was not until the 4th of September, 1876.

James Blackburn, the secretary of the company, said the note had never been paid or the amount of it tendered. As the note was not paid the policy was considered as cancelled, and the reason he wrote on the 8th of May to

Stephens, that he, the witness, might write to Stephens again upon the subject, was that the company was following Ferguson up, and they might require Stephens for a witness.

The evidence did not shew the communications between the insured and the company after the loss and before the suit. The claim for loss was sent in, which would probably be in September.

The defendants got letters from the attorneys on the 4th and 12th of September, no doubt informing them of the loss, and probably sending them the claim for and particulars of loss, for on the 13th of that month the defendants acknowledged the receipt of letters on these two days, "the latter with enclosures." On the 11th of December the defendants wrote to Mr. Benson for the insured, that they would not recognize any claim under this policy, and on the 20th of that month they acknowledged Mr. Benson's letter of the 16th, probably in answer to Mr. Benson's enquiry why they would not recognize any claim under the policy, and said: "I may say, without prejudice, that there are several reasons, notably non-payment of the note for premium, and misrepresentation."

The learned Judge said that as the note had not been paid, his opinion was the defendants were entitled to succeed on the issue on that condition: that Mr. Stephens never wrote to the defendants about the note until the day after the note was due, and that nothing was shewn which would excuse the non-payment of the note. And as to the misdescription of the property, the omission to mention the blacksmith's shop, the party sending forward the application assumes the correctness of it, and the company are entitled to treat it as correct, and if any building is within the prescribed distance, which was not communicated to the company, they are not bound by any representation which their agent may have made to the insured, and that the defendants were entitled also to a verdict on that issue. A nonsuit was entered.

During Easter term, May 25, 1877, *Robinson*, Q. C., obtained a rule calling on the defendants to shew cause why

the nonsuit should not be set aside, and a verdict entered for the plaintiff for the sum insured, with interest, on the leave reserved, on the ground that the plaintiff proved his right to recover, and that no defence was proved under the conditions of the policy or otherwise which was entitled to prevail: that the non-payment of the premium note, and the existence of the blacksmith's shop was not, under the evidence, any answer to the action; or why a new trial should not be granted, on the ground that the plaintiff, on the law and evidence, was entitled to recover, and why he should not be allowed to add a special replication to the third plea, and to amend the replication to the fourth plea according to the evidence.

During the same term, June 5, 1877, *J. K. Kerr*, Q. C., shewed cause, and *Robinson*, Q. C., supported the rule.

Mr. Justice Morrison having been appointed to the Court of Appeal, before judgment was given in this case, and Harrison, C. J., and Wilson, J., differing, the case by direction of the Court was reargued during this term, December 6, 1877.

J. K. Kerr, Q. C., shewed cause. As to the misrepresentation, there is no reason for laying the blame of not communicating the fact of the blacksmith shop being within 100 feet of the insured property upon the defendants, because Mr. Stephens, the agent and husband of Mrs. Stephens, the insured, knew the fact as well as the defendants' agent, and they both measured it with a tape line and found it was only 86 feet distant. Mr. Stephens filled a great part of the application up himself. Ferguson, the agent of the defendants, left before it was completed, and gave authority to Stephens, the husband, to sign his, Ferguson's, name to it, and Stephens, as agent for his wife, signed her name to the application, and he drew the plan of the buildings on the back of the application, and sent it to the defendants. It was therefore all his own doing, and he and the insured are alone answerable for it, and the concealment of that fact, or the misrepresentation by the diagram or otherwise, avoided the policy: *Shannon v. Gore District Mutual*

Fire Ins. Co., 37 U. C. R. 380; *Shannon v. Hastings Mutual Fire Ins. Co.*, 25 C. P. 470; *Shannon v. Hastings Mutual Fire Ins. Co.*, 26 C. P. 380; *Hazzard v. Canada Agricultural Ins. Co.*, 39 U. C. R. 419; *Lampkin v. Western Ass. Co.*, 13 U. C. R. 237; *Bleakley v. Niagara District Mutual Ins. Co.*, 16 Grant 198; *Jacobs v. Equitable Fire Ins. Co.*, 18 U. C. R. 140, 373; *McFaul v. Montreal Inland Ins. Co.*, 2 U. C. R. 59. Then the premium note was not paid at maturity, and such non-payment by the special condition of the policy defeated the whole insurance. The note was not negotiable, and it should therefore have been paid to the company: *Meagher v. Home Ins. Co.*, 10 C. P. 313, 322; *Wall v. Home Ins. Co.* 36 N. Y. 157; *Beadle v. Chenango Co. Mutual Ins. Co.*, 3 Hill 161; *Storms v. Canada Farmers Mutual Ins. Co.*, 22 C. P. 75, 81; *Sansum's Insurance Digest*, 933, 930.

Robinson, Q. C., supported the rule. The evidence shewed that Stephens left mention of the blacksmith's shop out of the application because Ferguson, the defendants' agent, told him it was not necessary to include it, as the insurance was being effected at a rate which applied to other buildings being at a distance of only 60 feet. Ferguson deceived the applicant, and the defendants should not be allowed to take the benefit of that act of their agent. As to non-payment of the note, the evidence shewed that Stephens wrote to the company on the 4th of May, and long before the fire, about the note, and that they on the 8th of that month informed him they had not the note: that they had never got it from Ferguson, and that he was not to pay it whoever called for the money. That was in fact a notice to the insured that Ferguson, whom the defendants called an impostor, and said they were in pursuit of, was not to be paid, nor any one else who might present the note, as the defendants only were entitled to the money. They had no idea then of avoiding the policy because the note had not been paid. They knew they could not ask payment of it when they had not got it in their possession. If they had intended to put an end to the policy then because

of the non-payment of the note, they should have said so plainly, as it was their duty to do, and the plaintiff might have insured elsewhere. But they did not do this then nor at any time afterwards, nor until two or three months after the fire. Such conduct is fraudulent, and affords a good answer to the avoidance of the policy for that cause: *Smith v. Mutual Ins. Co. of Clinton*, 27 C. P. 441; *Eureka Ins. Co. v. Robinson*, 56 Penn. St. 226; *Lyons v. Globe Mutual Fire Ins. Co.*, 27 C. P. 567; *Turner v. Wilson*, 23 C. P. 87; *Bigelow on Estoppel*, 2nd ed., p. 453; *Digest of Fire Ins. Cases*, "Estoppel," 445; *Kerr on Fraud*, 2nd ed., p. 55; *May on Ins.* 64, 433, 434, 435, 624.

December 28, 1878. HARRISON, C. J.—I am of opinion that the rule should be made absolute.

I not only think that the defendants are estopped from setting up the non-payment of the premium note as a defence to the action, but that under the circumstances proved at the trial there was no such concealment on the part of the plaintiff as to entitle the defendants to avoid the policy.

The portion of the policy relied upon is, as follows: "If any misrepresentation or concealment of facts has been made in the application, or if the applicant has misstated his interest in the property insured, or if he shall in any manner make any attempt to defraud this company, the policy shall be void," &c.

It is not alleged in the plea that there was any misrepresentation in the nature of a warranty on the part of the assured in answer to some question put to her in the application for insurance, but that there was a concealment by her of some fact material to the risk.

The allegation in the plea is that she "concealed from the defendants the fact that the said insured premises were situate near to and immediately opposite to a blacksmith's shop, which fact was one *material* for the consideration of the risk."

Where the omission to state certain facts in the application or otherwise is relied upon as a defence to the action, the question presented in the absence of warranty is upon

the materiality of the fact concealed to the risk: *Gates v. Madison County Mutual Ins. Co.*, 2 Coms. N. Y. 43.

Whether in the absence of warranty an omission to mention any particular fact was the omission of a fact material to the risk, is a question of fact on the evidence; *Elliott v. Hamilton Mutual Ins. Co.*, 13 Gray, Mass. 139; *Richmondville Union Seminary v. Hamilton Mutual Ins. Co.*, 14 Gray 459; *Clark v. Union Mutual Fire Ins. Co.*, 40 N. H. 333; *Tyler v. Aetna Fire Ins. Co.*, 12 Wend N. Y. 507. *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Peters 507; *Sexton et al. v. The Montgomery County Mutual Ins. Co.*, 9 Barb. 191.

The learned Judge who, without a jury, tried the case, did not find that the omission to mention the blacksmith's shop on the opposite side of the street to that on which the insured building was situate was the omission of a fact *material* to the risk, and I doubt if any jury could be found to do so.

The language of the learned Judge, according to the report of the short-hand writer, was as follows: "With regard to the misdescription of the property, it is very much to be desired that there should be some decision to which we shall all bow. As at present advised I am of opinion that the party sending forward the application assumes the correctness of it, and that the company are entitled to treat the representation made by him as correct. Consequently, if there are buildings within the prescribed distance, I think the company are not bound by any representation the person professing to act as their agent may have made. I think the defendants are entitled to a verdict on that ground."

Had there been a plea resting on the falsity of an answer to a question put in an application for the insurance, we should have had to consider whether all such answers are not by the contract made warranties, whether material or not, and whether there was not a false answer so as to avoid the policy, whether there was fraud or not, but no such question is raised for decision by the pleadings.

The rule is, that it is unnecessary to communicate to an insurance company that which it knows. An omission, therefore, to communicate that which an insurance company knows cannot, under ordinary circumstances, be such a concealment as to avoid the policy of insurance: *Redford v. Mutual Fire Insurance Co. of Clinton*, 38 U. C. R. 538, 540.

There is nothing to prevent a fire insurance company relying for its information, as to the proposed risk, solely on a written application to be made for the insurance, but if, instead of doing so, the company appoints an agent to solicit risks, it is impossible for the company wholly to escape a responsibility for the knowledge acquired by such agent in the course of his employment in the particular transaction, afterwards the subject of litigation: *Masters v. Maddison County Mutual Fire Insurance Co.*, 11 Barb. 626, 3 Bennett 398; *Marshall v. Columbian Mutual Fire Insurance Co.*, 7 Fost. 157, 3 Bennett 634; *Lee v. Howard Fire Insurance Co.*, 3 Gray 583, 3 Bennett 733; *Commercial Insurance Co. v. Spankneble*, 52 Ill. 53, 4 Am. 582; *New York Central Insurance Co. v. National Protection Ins. Co.*, 20 Barb. 486, 468; *Miller v. The Mutual Benefit Life Ins. Co.*, 31 Iowa 216, 7 Am. 122; *Davis v. The Scottish Provincial Ins. Co.*, 16 C. P. 176, 189; *Wyld v. The Liverpool, London, and Globe Ins. Co.*, 23 Grant. 442.

Besides, insurance companies ought not, if possible, to be allowed to repudiate all responsibility for the acts of their agents when giving information and advice as to what is necessary or not necessary to be contained in the applications for insurance: *Moliere v. The Pennsylvania Fire Ins. Co.*, 5 Rawle 342, 1 Bennett 451; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465, 4 Bennett 161; *Rowley v. The Empire Fire Ins. Co.*, 36 N. Y. 550, 553; *Combs v. The Hannibal Ins. Co.*, 43 Mo. 148.

Insurance companies, by special provisions in their applications for insurance, and in their policies of insurance, may endeavour to take all the advantage of the agency

without any liability for the ignorance or incapacity of their agents, but Courts must, as far as possible, look at the conduct of the parties, and in a proper case give relief on ground of estoppel or otherwise against an attempt, by cunning language, to make things appear what they really are not: *Chatillon v. Canada Mutual Fire Ins. Co.*, 27 C. P. 450; *Sinclair v. The Canadian Mutual Fire Ins. Co.*, 40 U. C. R. 206; *Shannon v. The Gore District Mutual Ins. Co.*, 40 U. C. R. 188.

The words at the foot of the application are, "That if the agent of the company fill up the application, he will in that case be the agent of the applicant, and not the agent of the company."

This may mean that if the agent fill up the application he shall for that purpose be deemed the agent of the applicant, but for all other purposes he shall remain the agent of the company. See *Beebee v. Hartford County Mutual Fire Ins. Co.*, 25 Conn. 51, 4 Bennett, 55; *Bleakley v. The Niagara District Mutual Ins. Co.*, 16 Grant 198; *Columbia Ins. Co. v. Cooper*, 50 Penn. 331.

The business of insurance is rapidly increasing in magnitude and importance. It is as essential to the companies themselves as to the assured that the laws declared applicable to them should be based upon just and equitable principles, and administered in a manner in harmony with an enlightened jurisprudence. It is quite time that the technical constructions which have pertained with reference to contracts of insurance, blocking the pathway to justice, and leading to decisions opposed to the general sense of mankind, should be abandoned, and that these corporations should be held to the measure of responsibility which is exacted of individuals. See per Day, C. J., in *Miller v. The Mutual Benefit Ins. Co.*, 7 Am. 128.

Now, in what manner was the fact of the blacksmith's shop concealed from these defendants at the time of the application for insurance?

The agent of the plaintiff, and the agent of the defendants, both saw the blacksmith's shop. The latter, not

believing the blacksmith's shop to be material to the risk, told the agent of the plaintiff that it was unnecessary to make any mention of it in the application. For this and for no other reason, so far as the evidence discloses, was the blacksmith's shop omitted from the application. The defendants now seek to defeat the plaintiff's claim because the plaintiff's agent, acting under the instructions of the defendants' agent, omitted the blacksmith's shop from the application for insurance. Such a defence is, on the facts, revolting to every principle of fair dealing, considered as between man and man. Law is said to be the perfection of reason: but if law admitted this defence on the facts to prevail, it would, in my opinion, be the perfection of iniquity.

The diagram or survey was made by the agent of the company, or under his directions. The agent, under instructions from the company, by endorsement on the application, is "to be particular in stating how the adjacent buildings are occupied, and of what material built and covered," &c. It is obvious therefore that the company did not mean to rest solely on the application of the insured, but as well on the survey made by their own agent. If then his survey be incorrect, surely the company, and not the assured, should be responsible and bear all the consequences arising from its incorrectness: *Continental Ins. Co. v. Kasey*, 18 Am. 681.

Where a fire insurance was effected in respect of certain premises through an agent called Donald, and one condition of the policy was, that any material mis-description of the property would render the policy void, the buildings were described as built of brick and slated, but it turned out after the fire that one of the buildings was roofed with tarred felt; and the company alleged that Donald their agent, was not their agent, but the agent of the assured, and contended that the mis-description rendered the policy void; it was held that the misdescription was not material to the risk, and if material, as it was made by Donald, the agent of the company, the assured was not responsible

for it: *Re Universal Non-Tariff Fire Ins. Co., Forbes and Co.'s Claim*, L. R. 19 Eq. 485.

This case marks a great stride made in England by a Court of Justice in the path of justice, notwithstanding the attempted obstructions of the insurance company. But it is a stride which previously had been successfully made under similar circumstances in the United States of America: *May v. The Buckeye Mutual Ins. Co.*, 25 Wis. 291, 3 Am. 76, 3 Bennett 555; *Benedict v. The Ocean Ins. Co.*, 1 Daly 8, 4 Bennett 462; and has already with some measure of success been made in this Province: *Shannon v. Hastings Mutual Fire Ins. Co.*, 26 C. P. 380, affirmed in Appeal, 2 App. 81.

Judges ought not to be astute to assist such an unjust defence as the present. Fortunately for the interests of justice the defence is not by the plea rested on anything contained in, or omitted from, the application for insurance as being a breach of warranty. The defence, as pleaded, is rested on the ground of the materiality of the fact concealed. The concealment is not even alleged to be in the application. It is therefore for a jury on the evidence to say whether there was any concealment, and if so, whether the fact concealed was material to the risk. Sitting as a Judge, I do not see anything in the evidence which concludes the enquiry or compels a jury to answer it contrary to their consciences. Sitting as a juror, I can only find one way, and that is in the negative.

If I could, as a Judge, bring myself to think that the plaintiff is concluded from disputing the materiality of the situation of the blacksmith's shop, either on the ground that the plea sets it up as a breach of warranty or on some supposed ground of estoppel, I could not at the same time avoid holding that it is inequitable for defendants to set up the act of their own agent for the purpose, after a fire, of defeating their own policy, and that they ought not, on the facts proved at the trial, to be allowed to do so. See *Chatillon v. Canadian Mutual Ins. Co.*, 27 C. P. 450; *Shannon v. The Gore District Mutual Ins. Co.*, 40 U. C. R.

188; *Sinclair v. The Canadian Mutual Ins. Co.*, 40 U. C. R. 206.

I think that the nonsuit should be set aside, and a verdict entered for the plaintiff on all the issues.

ARMOUR, J.—The only question argued before this Court, since I became a member of it, is as to how the issue joined on the third plea of the defendants ought to be found. The ground work of this plea is the stipulation in the policy that “if any misrepresentation or concealment of facts has been made in the application, or if the applicant has misstated his interest in the property, or if he shall, in any manner, make any attempt to defraud this company, the policy shall be void.” And the averment is, that in the said application for the said insurance the said Christina Stephens concealed from the defendants the fact that the said insured premises were situate near to, and opposite to, a blacksmith shop, which fact was one material for the consideration of the risk attending the said application of the said Christina Stephens for insurance, and by reason of such concealment the said policy became, and was, and is, void.

The defendants have not in this plea, as I take it, placed their defence on any ground of warranty, but merely on the ground of the concealment of a material fact, and the character of the defence is such that I, for one, will hold them strictly to the record.

Under this plea two questions arise. 1. Did Mrs. Stephens in her application for insurance conceal from the defendants the fact that the insured premises were situate near to, and opposite to, a blacksmith shop? 2. Was this fact one material for the consideration of the risk?

It is urged that Mrs. Stephens having signed the application in which is contained the following: “The applicant is requested to answer the above questions fully, as it is expressly agreed on the part of the applicant that this survey, as well as the diagram of the premises, shall form a part and be a condition of this insurance contract,” is to be taken to be conclusively bound by the application, and

that any omission to answer in such application the questions put to her therein fully is concealment on her part, such as would forfeit her policy, although such omission was made in good faith in obedience to the instructions of the defendants' agent who took the risk.

I cannot agree to this view of the law. See *Rowe v. The London and Lancashire Fire Ins. Co.*, 12 Grant 311.

It is also urged that nothing said by the agent on the occasion of taking the application is to have any effect whatever, so as to bind the defendants, because in the application "it is further agreed that if the agent of the company fill up the application, he will in that case be the agent of the applicant, and not the agent of the company." But I do not understand this to mean that, as to whatever instructions the agent of the company gives to the applicant as to how the application is to be filled up, he is to be considered the agent of the applicant, and not of the company.

It is to be observed that in this application all the questions to be answered by the applicant are included under the one denomination "survey," as well those questions the answers to which would be peculiarly within the knowledge of the applicant, and would not be apparent to and could not be ascertained by, the agent upon a survey of the premises, as those the answers to which would be apparent to, and could be ascertained by him on such survey. Within the latter class of questions is the one in controversy. "11. External exposure. What is the distance, occupation and materials of all buildings within — hundred feet?"

When an insurance company, as in this case, send forth their agent, furnished with their printed forms of application, and with their printed interim receipts, and clothe him with the full power to accept applications for insurance, to receive the premiums and other charges payable by the applicant, to give credit for the [premiums, to effect the insurance, and to grant interim receipts insuring the property applied to be insured from the date of the receipt for three years, or till the insured is notified to the contrary

by the company, I should have no hesitation in holding, in the absence of proof to the contrary, and there is no proof to the contrary in this case, that they had also clothed him with full authority to instruct applicants for insurance as to how and in what manner they should fill up the application, what they should insert therein, and what they should omit therefrom, more particularly when it must be known to the company that a large majority of those solicited by their agent to insure would be unable without his instructions to fill up their applications.

In this case, however, there is something more. The answer to the question in controversy had to be determined by an actual survey of the premises. This survey it was the duty of the agent to make. He did in fact make it, and the company charged the applicant a fee for it. He was perfectly aware of the proximity of the blacksmith shop, for he measured its distance from the insured premises himself. How, under these circumstances then, can it be said that the knowledge of the agent was not the knowledge of the company, and how can it be said that there was any concealment within the meaning of the stipulation pleaded? I find that there was no such concealment.

But assuming that there was concealment, was it of a fact material for the consideration of the risk. I see no evidence to shew that it was, and much that tends the other way. Looking at the answer to the question in controversy, it is as follows: "No. 1, within 12 feet of house owned by T. Downey. No. 2. 20 feet from No. 1. No. 3. 16 feet from No. 2. No. 3. 23 feet from No. 4. No. 4. 60 feet from house owned by T. Walsh," the question, so far as it relates to the occupation and materials of the houses, owned by Downey and Walsh is not answered at all. Did the company think an answer material? I think not, for although they sent back the application for amendment in another respect, they did not ask that it should be amended in this. Why? Obviously because they did not consider it material that the occupation and materials of these houses should be stated in the answer.

Now, is it reasonable to suppose that if the answer to the question had gone on to say, "and 85 feet from a building owned by," (the owner of the blacksmith shop, whatever his name may be), without stating the occupation or materials of such building, the company would have sent back the application for amendment in this respect, deeming it material that the occupation and materials of a building 85 feet away, should be stated, when they did not consider it material that the occupation and materials of a building, such as Downey's, only 12 feet away should be stated?

There is no evidence that the rate of premium would have been higher by reason of the proximity of the blacksmith shop. The secretary of the company was a witness and would, no doubt, have stated so had it been so, particularly after Stephens had sworn that the agent told him that it did not affect the rate as it was not within 60 feet.

Nor is it at all suggested that there would have been any extra hazard to the insured premises by reason of the proximity of the blacksmith shop, nor does it appear that a blacksmith shop is a special risk, but the contrary, for in answer to the question on the back of the application to be answered by the agent "are there any special risks within 150 feet or within fire range," the agent answers "one livery stable" only.

I find that the proximity of the blacksmith shop was not a fact material for the consideration of the risk, and I find a verdict for the plaintiff on the issue joined on the third plea.

WILSON, J.—I have not been able to change my mind by the second argument.

The third plea, after shewing the condition that all statements contained in the application are to be taken and deemed to be warranted, and that any misrepresentation or concealment of facts in the application will avoid the policy, rests the defence upon the fact of concealment by the assured of the insured premises being at the time of

the application "situate near to, and immediately opposite to, a blacksmith shop, which fact was one material for the consideration of the risk," by means of which concealment the policy became void.

It would have been better if the plea had shewn more fully, by a reference to the application, how and why it was the blacksmith shop being situate near to and immediately opposite the insured premises was a fact material to the consideration of the risk, and how and why its situation was or could be a matter of concealment, so as to avoid the policy.

The existence of a blacksmith shop "near to and immediately opposite" the insured property is not necessarily a matter material for the consideration of the risk, and the non-communication of its existence and situation are not necessarily a concealment by the insured of such facts which should defeat the policy.

"Near to and immediately opposite" the insured premises do not shew *how* near the blacksmith shop was. If the defendants had meant the shop was *so* near as to be material to the risk, that would have been more precise.

The real defence was, and is, that the blacksmith shop was within the distance of one hundred feet of the insured property, and its situation was not communicated to the insurers in the answers by the plaintiff in her application, nor in the plan of the locality, professing to represent the area of 100 feet round the insured property, which is endorsed upon the application.

And it would have been better if the plea had referred to the limit of 100 feet from the insured property, and had shewn what it was the application and policy required to be stated with respect to buildings within that particular distance, and then it would have appeared that the reason it became necessary to mention the existence of the blacksmith shop was because it was situated within the distance of 100 feet of the insured property, and then also it would have appeared whether the concealment of that fact alone was sufficient to avoid the policy, or whether it was the

materiality of that fact, as affecting the risk, which avoided it. The plea as drafted, I am of opinion, makes the materiality of the blacksmith shop, as affecting the risk, the substance of the issue, when in truth the defence is, that the policy was avoided by the concealment of the fact of the blacksmith shop being within the prescribed 100 feet as part and parcel of the contract, whether the blacksmith shop by its situation contributed to the risk or not.

The learned Judge who tried the cause did not determine whether the blacksmith shop was or was not material to the consideration of the risk. He said, "if any building is within the prescribed distance which was not communicated to the company, they are not bound by any representation which their agent may have made to the insured," that is the mere fact of the building being within the prescribed distance, and which fact was not communicated to the company defeated the policy.

That is, no doubt, the way in which the case was placed at the trial, and it was the way in which defendants should have framed their plea as before stated, but they have made the materiality of the matter in question the issue to be tried.

In my opinion the obligation to state what buildings were within the 100 feet was a part of the contract, and is not to be treated as a mere collateral representation: *Behn v. Burness*, 3 B. & S. 751; and the materiality of the fact, as bearing upon the risk has nothing to do with the question:—*Hardy v. The Union Mutual Fire Ins. Co.*, 4 Allen 217 (1862),—although there are several American cases the other way.

And if the defendants had put their defence upon the true ground, that the answer of the applicant as to such buildings was a part of the contract, they must have succeeded, because the contract of the applicant in that particular was not true, and her concealment of the fact avoided the policy.

As the materiality of the situation of the blacksmith shop was not considered or disposed of at the trial, it must

be tried before we can pronounce our opinion upon it, unless the application and policy have made the situation of all buildings within the 100 feet conclusive evidence, from that fact alone, material to the risk.

When a party can plead an estoppel, and it is by deed, he must do so to make it conclusive, but when he has no opportunity of doing so, or if the estoppel is not by deed, then the estoppel may be established by evidence, and it is conclusive in evidence. Here the policy is by deed, but it is the deed poll of the company. There is no deed of the plaintiff in this case. The estoppel against her, if one can be set up, is by writing only, by her application: *Co. Lit.* 363 *b.*

The defendants were therefore at liberty to set up at the trial the terms of the application against the plaintiff, and to hold her to the matters therein stated or omitted from it as evidence to sustain the issue on the third plea; and from that evidence and the other evidence given in the cause it must be inferred, in my opinion, that the matters in question were in fact and were so agreed to by the parties to be material to the risk, and so were evidence of the truth of the plea that then knowledge of such fact by the defendants was a matter material to the risk.

Then as to the question whether the plaintiff is bound by the application or not. It was contended she is not, because the blacksmith shop was omitted from the plan and application upon the representation of Ferguson, the agent of the defendants, who said it was of no consequence mentioning it, and that the application must therefore be considered to have been drawn as it is in respect to the blacksmith shop by the defendants' own agent.

In the first place the application provides expressly that although the defendants' agent fill up the application, he shall for such purpose be held to be the agent of the applicant and not of the company.

That is surely express notice that he is not the agent of the company for that purpose.

In the second place Ferguson, the defendants' agent, did not fill up the application. The plaintiff's husband did so.

In the third place, the husband, at Ferguson's desire, signed Ferguson's name to the application, the husband acting on that occasion as the agent of Ferguson, who was the agent of the company; and the husband signed his wife's name also to the application as agent for her.

As a fact, then, the application from beginning to end was the work of the plaintiff by her husband. He knew just as well as Ferguson that it was necessary to describe the blacksmith shop, and he could not, or should not, and need not have been misled by Ferguson as to whether he should or should not have specified the blacksmith shop, because the application is so plain in requiring all buildings within 100 feet of the house insured to be described; and if he chose to follow Ferguson's advice against the express language of the enquiry before him, and to fill up the answer and to sketch a plan both of which he knew to be untrue, the plaintiff, whom her husband represented, must be answerable for it, and not the defendants.

The plaintiff's husband also knew that he was not informing the defendants truly of the facts, to whom he personally sent the application at Ferguson's request.

If there had been an enquiry what mortgages there were on the place, it would certainly be a wrongful concealment in law if the applicant filled up and sent to the insurers a document saying there were no mortgages upon it, when there was one; and it would be no excuse for him to say that he answered as he did because the company's agent said it was of no consequence how he answered it; and so many other cases of the like nature might be put.

Here, too, by the express terms of the policy every statement is to be held a warranty, and by the application the party is requested to answer the questions fully, because whoever fills up the application, the application when drawn, is to be considered as having been prepared by the applicant.

The preparation of this application is wholly unlike in many particulars the facts of the case of *Re The Universal Non-Tariff Fire Ins. Co. v. Forbes' & Co.'s Claim*, L. R. 19 Eq. 485. In that case the applicants had nothing to do

with the application. It was drawn by the company's agent after an inspection he made of the premises. The insured told him nothing, he drew it up solely from his own inspection, and the statements there were not made a warranty.

We are embarrassed by our desire to do what we would like to do between the parties in the face of a very strict bargain, and against what we may think to be a not very fair defence. But our duty is to decide even in such cases according to the contract which the parties have made. To do otherwise is to do, so far as we are concerned, an injustice, which is not excused and is not allowable because we may be able to say we have done what is fair and equitable in the cause. I regret to be obliged to say that the plaintiff shall not recover in this cause, because she did not specify the blacksmith shop in her application when the shop itself had nothing to do with the fire, or with the loss which she sustained. I may think the defendants are not acting liberally, but I am not their censor, and therefore it is I feel obliged to decide in their favour, and to hold the third plea to have been fully proved.

Then as to the non-payment of the note. I am clear that the defendants' letter to the insured of the 8th of May, 1876, was intended by the defendants as an intimation to the insured that the note need not be paid until they had got it from Ferguson, their agent.

The insured asked the defendants in the letter of the 4th of May, to which the one of the 8th was an answer, if they held the note, and if the policy was good without being countersigned by the agent.

They answer nothing about the policy. If they intended to treat it as void, why did they not say so? It would only have been fair and reasonable to have told the insured that they considered it void, and then the insured would have known that she was no longer protected by the policy, and could have made an insurance elsewhere. But because they did not refer to the policy at all when they were

asked about it, and as it was their place to answer the enquiry, are the reasons why I have said they did not intend at that time to cancel the policy.

They did answer the question as to the note. They said they had never got it from Ferguson, and they were on his track, as he was an impostor, and then it is they tell the insured not to pay the note, whoever presented it. That was notice to the insured that if she paid the note after that, the company would look to her, and she would be liable to pay it over again to them. Their conduct and declaration misled the insured, and it was calculated to do it; and if it be true, as they say now, that they considered the policy as void when they wrote that letter, then I must add that they intended to mislead the insured, and that would be a case of positive fraud. I do not impute such misconduct to them, for I do not believe they intended to do anything of the kind, either to deceive the insured or to vacate the policy, at the time they wrote the letter. But acquitting them of anything like positive fraud, they are still liable for the purpose and intent of that letter, which was to give a further day of payment to the insured because they had not then the possession of the note. If it were payable to Mr. Blackburn only the company could have enforced payment from the makers without giving it up. If it were negotiable they could not. In either case they gave time of payment to the insured.

It was their place, then, to make some new arrangement about payment with the insured before they could forfeit the policy for non-payment of it. That they did not do. Then, when the fire happened in the early part of September, they received many letters on behalf of the insured, and they write as frequently in answer; but not until the 11th of December, and long after they had received the claim for and proof of loss, did they ever intimate to the insured that the policy was void for the non-payment of the note, and also for the misrepresentation or concealment before mentioned.

The cases of *Smith v. Mutual Ins. Co. of Clinton*, 27 C. P. 441; *Lyons v. Globe Mutual Fire Ins. Co.*, 27 C. P.

567; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, and the other references which Mr. Robinson made, are authorities for the disposal of the fourth plea in favour of the plaintiff.

Upon the issues joined upon the equitable replication to the fourth plea the plaintiff is entitled to a verdict.

Rule accordingly.

STEINHOFF V. ROYAL CANADIAN INSURANCE CO.

Marine insurance—Deck load—"Steam barge"—Vessel stranding—General average—Items recoverable.

A marine policy upon a vessel described as a "steam barge" was warranted by the assured "to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge." There was nothing else in the policy as to the vessel insured carrying a deck load: *Held*, that the "barge" mentioned in the policy did not mean the insured vessel, nor did it refer to a steam barge.

The vessel went ashore on Lake Huron, and was beached, after throwing out part of the cargo, as the only means, in the judgment of the captain, of saving all concerned.

Held, that the plaintiff was entitled to recover for the deck load as for general average, it not being excluded by the condition above mentioned, and there being evidence of a custom on the lakes for steamers to carry such loads, and to deal with them as subject to general average.

Held, also, that the plaintiff was not entitled to recover from the defendants for the wages and provisions of the crew while the vessel was stranded, and in endeavouring to get her off the beach, even though the damage done to the vessel was itself a ground for general average.

Held, also, that defendants were liable for the value of the repairs rendered necessary by the stranding, whether it was a general average loss or not, for it was a loss by perils of the sea.

Held, also, that the plaintiff was entitled to recover from defendants the proportion charged against the cargo and freight, and was not himself obliged to collect the share, if any, of general average stated against the owners of the cargo.

ACTION on a marine policy, dated 31st March, 1874, upon the ship or steam barge *W. S. Ireland*, to the amount of \$6,000, valued at \$8,000, beginning the adventure on the 1st of April, 1874, and so continuing and enduring until

the 1st of April, 1875, against the perils of the lakes, rivers, canals, fires, jettisons, excepting all perils, losses, misfortunes, or expenses consequent upon and arising or caused by the following or other legally excluded causes, viz., damage that may be done by the vessel thereby insured to any other vessel, &c., &c. The declaration alleged that while the vessel was navigating Lake Huron, having on board a cargo of salt and tan bark, to be carried on a voyage from Goderich to Windsor, for freight, the said ship and premises insured, not from incompetency of the master, &c., but by the force and violence of the wind and waves, and by storms and tempests, and other perils and dangers of the lakes, became and was leaky and strained, so that thereby the same was with the said cargo in great danger of foundering and perishing, and being totally lost and destroyed in the lake, and disabled from completing the said voyage; and in consequence thereof, and for the purpose of preserving the said ship and cargo from a total loss, it became and was necessary and expedient to jettison, and the master and crew for the preservation of the ship and cargo, did jettison and cast into the lake a large portion of the said cargo, whereby it was lost; by reason whereof the plaintiff, in respect of his interest in the ship, became liable to bear and pay a proportionate part of the value of the said cargo so jettisoned and lost, and thereby sustained a general average loss amounting to a large sum of money, to wit, the sum of ten dollars, by the \$100 for each hundred dollars so by him insured, whereby the defendants became liable to pay him \$600, for and in respect of the said \$6,000:

Second count: that after the jettison before mentioned, the ship, by the force and violence of the winds and waves, and by storms and tempests, and by other perils and dangers of the lakes, became and was leaky and strained, damaged and injured, so that the same was in great danger of foundering and perishing, and being lost and destroyed in the lake, or being driven on the beach or rocks with the remainder of the said cargo, and disabled from completing the said voyage; and in consequence thereof, and for the

general safety and preservation of the ship and cargo from a total loss, it became and was expedient and necessary that the ship should be run on the beach, and accordingly the ship was run upon the beach, whereby, by the action of the wind and waves while she was so lying on the beach, the said ship became leaky, and strained, and damaged, and injured and broken, shattered and bilged, and partially wrecked, and the remainder of the ship and cargo became and was damaged: that the plaintiff and his servants did, by reason of the premises, labour for and about the preservation of the ship; and in so doing, and in and about the removing of the ship from off the beach, and towing her into port, and in repairing the damage caused to the ship as aforesaid, and in repaying the owners of the cargo damaged for the damage aforesaid, the plaintiff necessarily incurred and laid out a large sum of money, to wit, \$4,000, by means of which the plaintiff sustained a loss on the ship, valued as aforesaid, to a larger amount than eight per cent. on all the money insured thereon to the amount of, to wit, \$21 for each \$100, and the defendants became liable to pay the same to the plaintiff.

And the plaintiff claims also for the labour of himself and his servants, and provisions for them, and for the costs of removing the ship from off the beach and towing her into port, and repairing the damage caused to her, and for compensation paid to the owners of the cargo that was damaged, and for interest, \$1,260.

Pleas: 1. Denial of policy.

2. To the first count, that the plaintiff was not interested in the steam barge and premises alleged.

3. To the first count, as to the jettison, that one of the conditions of the policy was, that the same was warranted by the plaintiff to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge. And the defendants aver that the said cargo so jettisoned, and in respect to which general average is claimed, was laden on the deck of the said barge.

4. To the first count, that the cargo and the alleged loss

of the same was an average loss under eight per centum within the meaning of the policy, and was not a general average loss.

5. To the second count, the same as second plea to first count.

6. To the second count, as to the remainder of the cargo, same as third plea to first count.

7. To the whole declaration, \$119.32 paid into Court, as enough to satisfy the claims of the plaintiff.

Issue.

The cause was tried at Chatham, at the Fall Assizes of 1876, before Burton, J. A., without a jury.

There was no dispute as to the freight on board, nor as to the part of it on deck or in the hold, nor as to any matters excepting whether the vessel, which was described in the application for insurance and in the policy as the "steam barge *W. S. Ireland*," was a barge or a propeller—that is, was rightly described; and whether certain items of claim hereinafter mentioned were claimable from the defendants as items of general average, or whether they were items of general contribution to be arranged for between the owner of the vessel and the owners of the goods carried.

The policy provided that, "no loss or particular average shall in any case be paid by the insurer unless the whole of such damage or loss (after deducting one-third new for old) equals or exceeds 8 per cent. of the valuation aforesaid." The valuation was \$8,000.

It also provided against responsibility by the company, for "any claim for wages or provisions furnished to officers and crew, while the property insured may be detained by any disaster, or during subsequent repairs, excepting always services rendered in protecting, recovering, and securing the vessel or property covered by this policy;" and further, "this policy warranted by the assured to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge."

As to the character of the vessel, the following evidence was given for the plaintiff:—

Sylvester St. Amorie, said: The *W. S. Ireland* is a steam barge propeller, an ordinary term on the lake. A steam barge is, I should say, a vessel for the navigation of the river, not for lake navigation. She was carvel built, not flat bottomed. She had a fixed main deck, high-pressure engine and screw. She had an upper deck and cabins fixed. There was an upper deck from aft 40 feet forward over the machinery, and cabins for the accommodation of crew, all forward, 60 feet, open.

Robert Thomas, insurance agent and adjuster. I should call such a vessel a freight propeller, or a propeller. A barge is a full built craft propelled by oars or towed. The words "steam barge" are used to distinguish such vessels from passenger vessels. Such a vessel is not recognized by us as a barge at all. It is a wrong term. If they are run by their own power they are not barges.

Captain Courneen, said: I have seen this steamer, I look upon her as a propeller. A barge is something which can't take care of itself—no engine; no sails; no propelling power of its own. This vessel was just as able to take care of herself as an Allan steamer. Never such a thing as a sailing barge here.

J. P. Hodges said: She is commonly known as a steam barge. She is a propeller. There are some vessels running to Lake Superior double decked, which are called steam barges. A barge is a vessel with no propelling power of her own, towed by another vessel. Steam barges and steam propellers are convertible terms.

Captain Roberts said: I understand the term "steam barge" as applied to distinguish freight from passenger steamers.

Alexis Robert said: I should suppose a steam barge is a barge with an engine in it. The *Ireland* is like any other propeller.

W. F. Greenwood said: The *Ireland* is a propeller.

James W. Steinhoff, plaintiff, said: It is a common thing to call such a vessel as the *Ireland* a steam barge, but she is a propeller. I sometimes called her a barge, sometimes a propeller.

For the defence.—*John Rice* said: I call her a steam barge. A propeller, as I understand it, has two decks, and all her cargo is under deck. The other has only one deck, and carries a portion on the main deck open, not under cover. She had no cover but what covered her engine and boiler, and for the purpose I suppose of having a cabin on the top of it. She is classed with us as a steam barge. She is classed as a steam barge in the Canadian Underwriters' Register 1873, (produced). It is the custom of all steam vessels to carry deck cargoes. We have double decked vessels which are called steam barges.

Mr. *Thomas* also said on the examination noted above: This is an adjustment made by me according to the custom of the lakes.

The learned Judge rejected the evidence he proposed to give as to the custom on the lakes as to what is treated as particular average, because he held that what was particular average was perfectly understood in law, and that a practice of insurance officers could not affect the law.

John Neelon (his evidence being received to prevent the necessity of a new trial, in case of its being held the learned Judge was bound to receive it) said: I am an insurance agent and average adjuster for five or six years. I examined the adjustment made by Mr. Boyd, of Montreal, who has a large experience. I think it a proper adjustment according to the policy. I made it out on the information of the plaintiff's letters. The practice here does not include the expenses paid to the wrecking company as a particular average loss to each party interested in the saving. The repairs at Port Huron I consider also as coming under the head of particular average. I take the value of the cargo at the port of destination, deducting the freight. That, I presume, was the principle adopted here. Mr. Boyd's adjustment was founded on the plaintiff's own figures. I wrote to the plaintiff for information, and got the information in consequence. I did not explain to him that he was to give the value at the port of destination. I merely explained that I wanted it for the purpose of the adjustment. The

company only pays the owner the sum he has to contribute, and he has to look to the others for contribution.

Cross-examination:—Even if the contributors fail, the insurance company has nothing to do with that. The charge for the wages is not by the English practice allowed at all as general average, but as it is the custom on the other side to allow it, as a compromise we allowed \$105. The dockage was incurred after the cargo left the vessel, and so was charged against the vessel, the portion of the charge for dockage going in, and when the cargo was on board, or for tugging the vessel to the dock. I fancy the survey was both on cargo and freight, and if so that may account for the division on the adjustment.

The following admissions were made and filed :—

The plaintiff claims compensation for certain goods lost which were on the vessel *Ireland*, and for injury to the vessel.

A certain portion of the goods was above the main deck. They were laden on deck as the defendants contend, but the plaintiff disputes that. If they were not so laden, compensation for them may be recovered under the policy.

If they were not so laden the plaintiff further contends that the *Ireland* was not a barge within the words of the policy, and that he may recover compensation in respect of such goods.

If the *Ireland* was a barge, and the goods were laden on deck, within the meaning of the policy, then it is admitted they cannot be the subject of compensation.

The vessel went ashore ten miles south of Bayfield in lake Huron. She was subsequently beached after throwing out a portion of the cargo, as the only means under the circumstances, in the judgment of the captain, of saving all concerned. The particulars appear more fully in the protest.

Certain expenses, amounting to about \$970, were incurred in getting her off the beach, which were paid by the defendants to the coast wrecking company and to captain Rice, the defendants' inspector.

The plaintiff claims that this sum is part of the damages and loss sustained which he is entitled to take into account with the cost of repairing the vessel, in order to make up the eight per cent. required by the policy, before particular average can be claimed. The defendants contend otherwise.

The damage caused to the vessel by beaching was repaired at an expense of \$335.71, after getting her off and into the dock. The plaintiff contends that such sum is general average, both as between the plaintiff and the defendants, and between all concerned.

The defendants contend that it is not general average in any share.

In valuing the cargo for the purpose of general average, the plaintiff contends that the value at the port of destination should be taken, while the defendants assert that it should be the value at the port of shipment.

The plaintiff contends he is entitled to recover from the company the full amount which he can claim from any source, and that the company must look to the owners of the cargo for their contribution.

The protest stated that the vessel laden with 65 cords of tan bark and 150 barrels of salt, left Goderich at 4 p. m., on the 10th of November, for Detroit, in fine weather; that at 6 p. m. the wind changed, and at 7 p. m., when 10 miles south of Bayfield, it being found the vessel could not clear Kettle point, an attempt was made to return to Goderich. It was found that could not be done, as the wind blew a gale directly on shore. Eventually, having thrown part of the cargo overboard, steerage way being lost, the waves breaking over the vessel so as to endanger the upper decks, and the shore only half a mile off, the vessel was beached as the only alternative.

It appeared from *St. Amorie's* evidence that 10 or 15 cords of bark were jettisoned before the beaching, and more was thrown out after, only 15 cords being left under the upper deck. There seemed to have been about five cords on deck at first. About 29 or 30 barrels of salt were saved and landed at Sarnia.

The letters of the plaintiff to the defendants of the 11th February, 1875, and the 5th April, 1875, admitted that the vessel had 35 tons of bark in the hold, and 25 tons of bark and 165 barrels of salt on deck.

The defendants' adjuster, W. E. Boyd, on the 28th April, 1875, stated the accounts in detail between the parties. The result may be stated as follows:—

The aggregate amount is\$2928 88
apportioned as follows:—

As general average—

The bark in the hold, freight
upon it, the coast wrecking
company's services, repairs,
&c\$1584 05

As general contribution—

The deck load and freight on it 544 00

As falling on the
owners, one-third
of new repairs for
old work..... \$251 49

And for new pro-
peller wheel 200 00
————— 451 49

And for what is called
ship net: for some
repairs..... \$249 34

A share of dockage... 75 00

And a share of sur-
veyor's fees..... 25 00
————— 349 34

—————
\$2928 88

The item of general average is
then dealt with as follows.....\$1534 05.

Vessel valued.....\$8000 00

Less for repairs, being the two
items of \$451.49 and \$349.34
before mentioned 800 00

—————
\$7200 00
—————

Her share on same value	\$1523 33
Cargo, 40 tons bark, \$200.....	42 31
Freight under deck contributed for \$87	18 41
	<hr/>
	\$1584 05

Then the vessel's share of the general average,
as last mentioned, is\$1523 33

Apportioned as follows:—

The underwriters on \$6,000, on
the value of the vessel, which
was the sum insured, pay...\$1142 50

And the owners pay on the
remaining value of the vessel
2000 380 83

\$1523 33

Then the last mentioned sum of\$1142 50

is settled by the defendants,
deducting such sums which
they paid for saving the
vessel, &c., and which sums
are allowed as above in the
general average account,
amounting to\$1038 18

Leaving as the balance still to
be paid to the owners..... 104 32

\$1142 50

The defendants afterwards added for protest, &c., \$15' included in the above sum of \$1038.18, making the whole sum they admitted to be due to the plaintiff, \$119.32, and that sum they paid into Court.

Mr. *Thomas*, for the plaintiff, also drew up a statement making in effect the item of \$544 general average, which the defendants denied it to be—Excepting in that respect the two statements were substantially alike.

The learned Judge found that the following items were to be treated as general average:—

The cargo, valued at	\$ 622 50
The freight on same	189 50
Telegrams	5 70
Extra labour on beach	5 50
Coast wreckers' claim	831 82
Captain Rice's claim after wreck	136 36
Repairs after deducting a third	142 67
Dockage	27 16
Surveyor's fees	8 15
Adjustment.....	25 00
Telegrams	15 00
	<hr/>
	\$2009 36

Which was apportioned as follows:—

Vessel valued at.....	\$8000 00	
Less repairs.....	800 00	
	<hr/>	
	\$7200 00	pays \$1798 76
Cargo called	604 00	" 163 38
Freight	189 00	" 47 22
	<hr/>	
		\$2009 36

Then the sum of.....\$1798 76
was brought forward, and was apportioned as
follows:—

Vessel valued at \$8,000. Under- writers on policy of \$6,000 pay	\$1349 07
Owners on the other \$2,000 pay	449 69
	<hr/>
	\$1798 76

Then the sum of.....\$1349 07
is brought forward for settlement.

Captain Rice's claim	\$ 136 36
Wrecker Co.'s claim.....	831 82
Surveyors fees, protest, and telegrams.....	27 27
Balance to be paid by under- writers.....	353 62
	<hr/>
	\$1349 07

Balance brought forward	\$ 353 62
Paid into Court	119 32
	<hr/>
	234 30
One year's interest.....	13 70
	<hr/>
Verdict for plaintiff	\$248 00

The learned Judge also found that the vessel insured was not a barge within the meaning of the policy, the words being "This policy warranted by the assured to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge."

During Easter term, May 25, 1877, *Henry J. Scott*, for the plaintiff, obtained a rule calling on the defendants to shew cause why the verdict should not be increased, on the following grounds:—1. That the learned Judge at the trial disallowed, as an item of general average, the plaintiff's claim for provisions and wages of the crew of the vessel while they were engaged by the defendants in getting the vessel off the beach where she was stranded, amounting to \$185. 2. That the learned Judge also disallowed the plaintiff's claim for repairs to the vessel for damage sustained by her stranding, amounting to \$374, such item having been treated as a claim of particular average instead of general average. 3. That the learned Judge disallowed as a claim the amounts of general average which the owners of the cargo and freight are liable to pay for jettison and stranding of the vessel, amounting to upwards of \$210. 4. That the verdict ought to be increased beyond the sum found for the plaintiff to a sum equal to three-fourths of the said several sums, being the proportion to be borne by the defendants with respect to the amount to be borne by the owner of the vessel.

Robinson, Q. C., for the defendants, obtained a rule, calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside and a verdict be entered for the defendants, or why the verdict should not be reduced to such sum as the Court might think fit, pursuant to the Law Reform Act.

During the same term, May 31, 1877, *Atkinson*, for the plaintiff, shewed cause to the defendants' rule, and supported the plaintiff's rule. The ruling of the learned Judge was right, that the vessel was not a barge, and so that part of the policy does not apply which declares there shall be no contribution for goods laden on deck on any sail vessel or barge. This vessel was classed as a steam propeller. She is decked all over. A barge is a vessel which is not propelled by steam or sails, but is moved by the aid of another vessel. That condition as to sailing vessels and barges does not apply to this steam vessel, and does not prevent the plaintiff from recovering for the loss of the deck load. The defendants contend that the voluntary stranding is not a general but a particular average. The authorities in the United States consider it as general average: *Arnould on Insurance*, vol. ii., 4th ed., 776, 778; *Emerigon on Insurance*, ch. 12. sec. 13; 2 *Phil. on Insurance*, 1312; *Bradhurst v. Columbian Ins. Co.*, 9 Johns. 9. Adjusters in England have acted the other way, treating a voluntary stranding as a particular average: *Stewart v. The West India and Pacific Steamship Co.*, L. R. 8 Q. B. 88; *Lowndes on Average*, 2nd ed., p. 30 of the table at the beginning of the work, and in the body of the work, pp. 77 to 85; *The Columbian Ins. Co. v. Ashby*, 13 Peters 331. As to the meaning of the term *barge*: *Arnould on Insurance*, vol. i., 4th ed. 261 to 280; and the usage as to carrying deck loads: *Spooner v. The Western Assurance Co.*, 38 U. C. R. 62; *Robertson v. Clarke*, 1 Bing. 445; *Uhde v. Walters*, 3 Camp. 16. It was also held at the trial that the plaintiff could not recover against the defendants the proportion which the cargo and freight were entitled to as general average, but that the plaintiff must resort to the owners of the cargo for such proportion. The plaintiff contends he is entitled to recover the whole of his demand for compensation from the insurers, and that it is their place to re-imburse themselves by resorting to the owners of the cargo: *Dickenson v. Jardine*, L. R. 3 C. P. 639; 2 *Phil. on Insurance*, 1348; *Lowndes on Average*, 2nd ed., 283; *Arnould on Insurance*, vol. ii., 4th

ed., 817; *Jumel v. Marine Ins. Co.*, 7 Johns. 412. Nor did the learned Judge allow to the plaintiff the claim for wages and provisions while the crew were engaged in getting the vessel off the beach, and while she was in dock being repaired. These services the crew were not bound to render to enable the ship to earn her freight. The policy provides that the defendants shall not be liable for "any claim for wages or provisions furnished to officers and crew while the property insured may be detained by any disaster, or during subsequent repairs, excepting always services rendered in protecting, recovering, and securing the vessel or property covered by this policy," and the latter clause is applicable to this case: *Arnould* on Insurance, 4th ed., vol. ii., 725 to 767; *Lowndes* on Average, 2nd ed., 257. The plaintiff got a verdict beyond the \$119.32 paid into Court of \$248, made up of \$234.30 principal, and of \$13.70 interest. The plaintiff contends the verdict should be as follows, according to his rule:—

The above sum of principal	\$234 30
And three fourths of the sum of...\$185 00	
for wages and provisions.	
Of the sum of	\$249 34
for two-thirds of the repairs occasioned by the voluntary stranding of the sum of.....	210 60
being the proportion to be paid by	_____
cargo and freight.....	644 94=483 71
	<hr/>
	\$718 01
And that there should be two years' interest given	= 86 00
	<hr/>
Total..	\$804 01

[The sum, however, Mr. *Atkinson* stated at the close of the argument, which he claimed was \$681.34. It was not said how that sum was made up, but as it is less by a good deal than the claim which was made under the rule, it is of no consequence.] He referred also to *Lowndes* on Average, 2nd ed., 220; *Arnould* on Insurance, 4th ed., vol. ii., 824; *Simonds v. White*, 2 B. & C. 805; 2 *Phil.* on Insurance, 1314, *et seq*; *Emerigon* on Insurance, 324.

Robinson, Q. C., contra, McMahon, Q. C., with him. The first enquiry is: Is this vessel a barge? If it be, that puts an end to all discussion as to the deck load, and the damages should be reduced to \$96. The plaintiff cannot be allowed to say that it was not and is not a barge, because, both in his application for insurance and in the policy, following his own description, it is represented as a *steam barge*. When the policy provides that the defendants shall not be liable for any deck load put upon any "sail vessel or barge," that general term *barge* applies to every kind of barge, whether a steam barge or otherwise. Captain Courneen said there was no such thing as a sail barge. The words therefore, "sail vessel or barge," do not mean *sail* vessel or *sail* barge. Many of the witnesses, in describing a steam barge, describe just such a vessel as this one is: *Falconer's Marine Dictionary, Barge*; *Arnould on Insurance*, 4th ed., 216, 217, 273, 280; *Crofts v. Marshall*, 7 C. & P. 597; *Blackett v. The Royal Exchange Assurance Co.*, 2 C. & J. 244, 2 Tyr. 266; *Mason v. Hartford Fire Insurance Co.*, 29 U. C. R. 585; *Hall v. Janson*, 4 E. & B. 500; *Wigglesworth v. Dallison*, 1 Smith's L. C., 7th ed., 598; *Chaffey v. Schooley*, 40 U. C. R. 165; *R. & J's Dig.*, 1369. The learned Judge was right in disallowing the plaintiff's claim upon the defendants of such sum, as the owners of the cargo are liable to contribute. The remedy is against them, and he has that still.

The plaintiff is bound by his designation of the vessel as a barge, simply because he has contracted with the defendants and they with him on the faith of its being a barge, and he must abide the consequences. It is a good custom that goods laden on deck, which are jettisoned, are not to be paid for by the underwriters: *Miller v. Tetherington*, 6 H. & N. 278; *Lowndes on Average*, 2nd ed., 1; *Birkley v. Presgrave*, 1 East 220. Wages and provisions are not a proper general average charge, although the defendants have paid \$129.50 of the total charge made of \$185. The item of \$87.50, freight on the 35 cords of bark which was in the hold, should not have been

allowed either, although the defendants have allowed it and paid it: *Fletcher v. Alexander*, L. R. 3 C. P. 375, 381. The case of *Johnson v. Chapman*, 19 C. B. N. S. 563, shews the deck load is liable to general contribution, but not to general average: *Dickenson v. Jardine*, L. R. 3 C. P. 639. The defendants are not liable in any way in respect of the deck load.

December 28, 1877. WILSON, J.—The questions which are to be considered in the present case upon the plaintiff's rule, are:—

1. Should the item of \$185 for wages and provisions of the crew, from the time of the stranding until the vessel was taken to Port Huron—7 days,—be allowed as general average?

2. Should the item of \$249.34, two-thirds of the repairs done to the vessel, occasioned by the voluntary stranding, be allowed as general average?

3. Is the plaintiff entitled to recover from the defendants the three-fourths of the item of \$210.60, being the proportion which the cargo and freight were to contribute towards the loss?

And upon the defendants' rule they are:—

1. Was the vessel insured a barge or not?

2. Whether she is a barge or not, was there a custom, and if so is it a good custom, that goods carried on deck shall or shall not be considered the subject of general average?

I may begin with the question whether the vessel insured was or is a barge within the terms and meaning of the policy?

The application for insurance describes the vessel as a steam barge, and the policy granted upon the application is upon a steam barge.

There is nothing said for or against the insured vessel carrying a deck load. The only part of the policy which has any reference to this subject is what is contained in the 22nd and 23rd lines. "This policy warranted by the assured to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge."

There was a great deal of evidence taken at the trial for the purpose of shewing what the insured vessel really was. It was said there were steam barges, and barges also without steam or sails, which were dependent for their motion wholly upon other vessels, or upon oars or poling. It was said there was no such thing known as a sail barge. That latter statement was made in order to make out that the words in the policy "sail vessel or barge" did not mean sail vessel or sail barge, but a sail vessel or a barge.

I think the barge referred to in that clause of the policy does not mean the *insured* vessel, nor does it refer to a *steam* barge.

The clause may have relation to goods transferred from the vessel insured to another vessel, a sail vessel or barge, in order to land them; and if such a transfer did take place, the insurers were not to be liable for the loss of the goods so transferred to such sail vessel or barge if they were laden upon the deck of such sail vessel or barge.

Such a provision could have no effect at all, if the vessel insured were admittedly an ordinary steamship or vessel, and were so described in the policy, unless the words "sail vessel or barge" be construed as referable to some other vessel than the one which was insured, simply because the steamship or vessel which was insured could not possibly be intended by the words "sail vessel or barge."

And in my opinion the like question arises here, although the vessel insured is called a steam barge, and the words in the condition "sail vessel or barge" are used, which raise some doubt whether because the word *barge* is mentioned in the condition, it does not include the steam barge insured as well as any other kind of barge. I think it does not include the vessel insured.

In *Webster's Dictionary*, *barge*, among its other meanings, is said to be "a double-decked passenger and freight vessel without sails or power, and towed by a steamboat."

In *Falconer's Marine Dictionary* one of the meanings of *barge* is "the name of a flat bottomed vessel of burden

used on rivers for conveying goods from one place to another, for loading and unloading ships, and has various names, as a wear barge, a west country barge, a sand barge, a row barge," &c. Other dictionaries give the like definition of it.

It is also described in these works as a boat of state and pleasure, furnished with elegant apartments, canopies and cushions, equipped with a band of rowers, and adorned with flags and streamers. The barge in question was not one of this latter class.

Treating the condition as to a deck load on a sail vessel or barge as not applicable to the steam barge which was insured, the next enquiry is, whether the goods laden on deck were the subject of general average as against the insurers.

For that purpose the policy must be read either as if the condition about a deck load on a sail vessel or barge were not contained in the policy, or as if the effect of that condition were that a deck load on any other vessel, (and therefore upon the steam barge insured), than that upon a sail vessel or barge was to be treated as the subject of general average.

The policy must be read along with the condition which is contained in it. It cannot be rejected. The maxim "*expressum facit cessare tacitum*" applies; and there was evidence also that by the custom of the lakes deck loads were allowed to be carried by steamers, and that they were dealt with as subject to general average.

A deck load is not in general held to be protected by the policy on the ship. The policy is to be read, although nothing is said of a deck load, as if it were expressly excluded by the policy: *Arnould* on Insurance, 4th ed., 267-766; *Lowndes* on Average, 2nd ed., 39.

But if by a well settled and generally known usage of the particular trade on which the underwriter assures, the specific description of goods insured is customarily carried on deck, the more general usage gives way to the more particular one, and the underwriter is liable.

The case of *Spooner v. The Western Assurance Co.*, 38 U. C. R. 62, shews that a custom to carry deck loads, and

to treat them as general average, may be shewn. There are many authorities referred to in that case, both English and American, establishing that a custom of the kind is valid and allowable: *Da Costa v. Edmunds*, 4 Camp. 142; *Miller v. Tetherington*, 6 H. & N. 278, affirmed 7 H. & N. 954; *Gould v. Oliver*, 2 M. & G. 208.

The plaintiff is, in my opinion, entitled to recover for the deck load, as for general average, against the insurers upon this policy; and I think they would be entitled to recover upon any policy which did not expressly exclude the deck load, because of the custom before mentioned to carry the deck load on steamers as an ordinary and proper mode of transit.

The plaintiff's claim, being relieved from the objections made to it by the defendants, must at least stand as it is, unless it is to be added to upon any of the grounds relied upon by the plaintiff for that purpose.

The first enquiry is: Is the plaintiff entitled to recover for the wages and provisions of the crew while the vessel was stranded, and while aiding to get her off the beach?

The defendants allowed to the plaintiff \$129.50, but the learned Judge disallowed the whole of it at the trial.

In *De Vaux v. Salvador*, 4 A. & E. 420, it was held that the owner of the ship could not recover from the underwriter the expense of the wages and provisions of the crew during the time the ship was detained in port making repairs to her from damage sustained by perils of the sea.

In *Wilson v. The Bank of Victoria*, L. R. 2 Q. B. 203, it was held the owner of a ship could not recover against the owners of goods on board the ship an amount which was claimed as their contribution to general average for expenses the owner of the ship was put to in the purchase of an extraordinary quantity of coal, which was rendered necessary by the sailing power of the vessel being so badly damaged by the perils of the sea that it could not be used, and although the steam power was only an auxiliary aid to the sailing power, because it was the duty of the owner of the ship to give the services of the crew and the ship, and to make all necessary disbursements under his contract

with the freighters. At p. 212 it is said by Blackburn, J.: "The case is similar to that of an ordinary sailing vessel, in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature."

In the first of these cases it was argued very strongly for the plaintiff that there was a difference when such extra charges were incurred to repair some damage, such as the carrying away of a mast, which was not general average, and when the damage itself was the cause of general average. And in the last case, at p. 209, a passage is cited from *Abbott on Shipping*, 8th ed., 497, maintaining the allowance of such a claim when the damage done to the ship is itself a ground for general average. And *Lowndes on Average*, 2nd ed., 161, argues strongly in the like manner, but he admits that by the law of England the wages and provisions of the crew are not allowable in such a case.

The law of England then being clear upon the point, because the freighter is by his contract entitled to have the benefit of the ship and of its crew for the voyage under all circumstances, we must accept it as our guide, and affirm the decision of the learned Judge, who disallowed that claim.

The next enquiry is, as to the \$249.34, the two-thirds of the value of the repairs rendered necessary by the stranding.

The plaintiff claims it, the defendants have not allowed it, nor has the learned Judge.

I do not see why the defendants should not pay it whether it is a general average or not, because it was a loss by perils of the sea.

If it be a general average loss, the owners of the cargo would have to bear a share of it. If it be not, the insurers must bear it all.

Whether it is a general average loss or not depends upon

the fact whether the act was voluntary, and whether it was a sacrifice made of the ship for the good of both ship and cargo. That the act was voluntary is not disputed, but it was denied that it was a sacrifice made by the owner for the common good.

And it was not a sacrifice if the vessel were virtually a cast away at the time it was determined to run her on the beach.

And I think the evidence contained in the protest of the master and mate shews the vessel would have gone ashore or been lost if she had not been beached, and that it was merely a question of time and place where and when she could be beached.

It appeared that after the master failed to weather a point in the course of his voyage, he tried to regain the port he had left and could not; that the storm was so great that the vessel had lost her steerage way. There was danger of her upper works being carried away. The deck load was thrown overboard. She was rolling badly in the trough of the sea, and was only half a mile from the shore; and seeing there was no alternative, she was headed for the shore and stranded. I refer to *Arnould* on Insurance, 4th ed., vol. ii., 776-778; *Lowndes* on Average, 2nd ed., 77-85; *Johnson v. Chapman*, 19 C. B. N. S. 563, 582; *Stewart v. The West India and Pacific Steamship Co.*, L. R. 8 Q. B. 88, 362.

But if the claim cannot be treated as general average, it is certainly a loss by perils of the sea, to be paid by the insurers of the vessel to the insured.

The sum of \$249.34 must therefore be brought into account between the plaintiff and defendants.

The remaining question is, whether the plaintiff is entitled to recover from the defendants the proportion which has been charged against the cargo and freight, and leave the defendants to get it back again from the owners of the cargo if they can do so, or whether the plaintiff is himself obliged to collect the share of general average stated against the owners of the cargo?

It is said in *Lowndes on Average*, 2nd. ed., 282 to 285, that if the vessel, the subject of insurance, be itself injured, which injury is a general average, that the insurer must pay the whole amount in the first instance if the owner of the ship require it, and that the insurer must then resort to the parties in the owner's name for restitution who are liable to contribute on a general average statement. But it is said if the vessel is not injured, but the owner is put to expense, as in hiring a steamer to tow the ship out of danger, that the owner can look to the insurers for the sum they are liable for after resorting to those who are liable to contribute for general average.

Here the damage was done to the ship itself, the subject of insurance, by stranding.

As I understand the case, all the salt but thirty barrels was thrown overboard, and all the bark but thirty-five cords or so, which were in the hold; and the bark which was left in the vessel when she was stranded was thrown on the beach and lost.

The whole of the goods were, with the exception of the thirty barrels of salt, lost when the vessel was taken off the shore at the instance of the defendants and repaired, and the thirty barrels of salt belonged to and were disposed of by the owner of the vessel.

The whole expense of floating and repairing the vessel was, I think, a service rendered for the ship alone, and to repair damage done to the subject insured; and according to the reference before named, and to the case of *Kemp v. Halliday*, 6 B. & S. 723, in which case the vessel was raised, and *Dickenson v. Jardine*, L. R. 3 C. P. 639, the insured is at liberty to look to the insurers for the whole amount, and they in their turn, if they have any claim against any of the owners of the cargo, must look to them; but what claim the defendants can have against them I do not know, for they have lost all their goods. The 30 barrels of salt saved have not been taken into account against the defendants.

The result is, that the accounts will be modified as follows:

Verdict rendered at the trial.....	\$ 248 00
The costs of repair of damage by stranding	\$ 249 34
The amount, stated as above, against cargo and freight	210 60
	<hr/>
	\$459 94
Deduct $\frac{1}{4}$ for the share of the owner of the vessel	\$ 114 98
	<hr/>
	344 96
	<hr/>
	\$592 96

The verdict will then be entered for the plaintiff for the sum of \$592.96.

HARRISON, C. J., concurred.

MORRISON, J., having been appointed a Judge of the Court of Appeal, took no part in the judgment.

Rule accordingly.

O'DONOHUE V. WILSON.

Chattel mortgage to secure indorser—Recital—Affidavit.

A chattel mortgage recited that the mortgagee had endorsed at the request and for the accommodation of the mortgagors a certain promissory note bearing even date therewith, and payable three months after date to C. B., or order, for \$1000. The proviso and covenant was to pay the said note at maturity, and save harmless the said mortgagee against his endorsement thereof.

The affidavit of the mortgagee stated that he endorsed the promissory note in the mortgage named: "that the said mortgage was executed in good faith, and for the express purpose of securing the due payment of the said promissory note, and security and indemnity to me against the said endorsement or any loss thereby, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said mortgagors therein named, or preventing the creditors of such mortgagors from obtaining payment of any claim against the said mortgagors."

Held, that if necessary the agreement between the parties was sufficiently set forth in the mortgage and verified in the affidavit; but *quære*, whether this is required except in the case of an agreement for future advances.

Held, also, that the affidavit was otherwise sufficient, though not in the exact words of the statute.

INTERPLEADER. The property in dispute was a quantity of household effects in a dwelling house on Jarvis Street, in the city of Toronto.

The defendant claimed the right to seize the goods on an execution against the goods and chattels of Margaret Beatty and Catharine Wilson, both of the city of Toronto, in whose possession the goods were at the time of the seizure.

The plaintiff claimed the goods were under a chattel mortgage from Margaret Beatty and Catharine Wilson, dated 30th January, 1877, and duly filed in the office of the Clerk of the County Court of the County of York, on 2nd February, 1877.

The question for trial was, whether the goods were, or some part thereof was, at the time of the seizure the property of the plaintiff, as against the defendant, the execution creditor.

The issue was tried at Toronto, at the Summer Assizes for 1877, before Galt, J., without a jury.

The recital of the mortgage under which the plaintiff claimed was as follows: "Whereas the said mortgagee hath endorsed at the request and for the accommodation of the said mortgagors a certain promissory note, bearing even date herewith, and payable three months after date, to Charles Beatty, or order, for the sum of one thousand dollars." The operative part was as follows: "Witnesseth that the said mortgagors, in consideration of the said endorsement, made at or before the sealing and delivery of these presents, hath granted, bargained, sold."

The proviso was upon the condition that the mortgagors should well and truly pay "the said note at maturity, and save harmless the said mortgagee against his said endorsement of the said promissory note."

The covenant was, that the mortgagors should "well and truly pay, or cause to be paid, the said note, and indemnify and save harmless the said mortgagee against his endorsement thereof."

The affidavit of the mortgagee was as follows:—

1. "That I endorsed the promissory note in the said mortgage named.
2. That the said mortgage was executed in good faith,

and for the express purpose of securing the due payment of the said promissory note, and security and indemnity to me against the said endorsement or any loss thereby, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said mortgagors therein named, or preventing the creditors of such mortgagors from obtaining payment of any claim against the said mortgagors."

The *bona fides* of the mortgage was not disputed, but objection was taken to the sufficiency of the recitals in the mortgage, and of the affidavit of the mortgagee.

The learned Judge ruled in favour of the sufficiency of the mortgage, and entered a verdict for the plaintiff, reserving leave to defendant to move to enter a verdict for defendant on the objections raised at the trial, and which more fully appear in the rule *nisi*.

During this term, November 19, 1877, *Donovan* obtained a rule calling on the plaintiff to shew cause why the verdict obtained in this cause should not be set aside and a verdict entered for the defendant, pursuant to leave reserved, upon the grounds of misdirection of the learned Judge, in not ruling that the chattel mortgage under which the plaintiff claimed was void against the defendant, an execution creditor of the mortgagors:

1. Because there is no recital in the mortgage of the terms, nature and effect of the agreement. or of any agreement between the parties to it, as and in the manner required by section 5 of Consol Stat. U. C. ch. 45, but only a recital of the fact that the plaintiff had endorsed a certain promissory note for the mortgagors, which note the said mortgage does not identify, nor does the said mortgage shew any liability on the part of the plaintiff to pay the same.

2. Because the affidavit of the mortgagee is not in accordance with the statute, by not stating that the mortgage truly sets forth the agreement entered into between the mortgagee and the mortgagors therein named, and

truly states the extent of the liability intended to be created by such agreement, and incurred by such mortgagee, and that the said mortgage was executed in good faith, and for the express purpose of securing the mortgagee against the payment of the amount of his liability for the mortgagors as therein set out, but for the express purpose of securing the due payment of the said promissory note.

John O'Donohoe, plaintiff in person, during the same term, November 27, 1877, shewed cause. The recitals in the mortgage are sufficient: *Mathers v. Lynch*, 28 U. C. R. 354; and the affidavit is also sufficient: *Heward v. Mitchell*, 11 U. C. R. 625.

Donovan, contra. The mortgage is insufficient, both as to the recitals and the affidavit: *Mathers v. Lynch*, 28 U. C. R. 354, 363; *Harding v. Knowlson*, 17 U. C. R. 564; *Boulton v. Smith*, 17 U. C. R. 400, 18 U. C. R. 458; *Kough v. Price*, 27 C. P. 309.

December 28, 1877. HARRISON, C. J.—Where a security for a debt or liability is *bonâ fide*, the Court will struggle to support the security as against mere formal or technical objections.

The security here is endeavoured to be supported under Consol. Stat. U. C. ch. 45, sec. 5, and is attacked because of alleged non-compliance with that section.

The section, as framed, contemplates two cases, differing in character, and makes separate provision for each.

These are :

1. The case of an agreement in writing for *future* advances for the purpose of enabling the borrower to enter into and carry on business with *such advances*, the time of repayment thereof not being longer than one year from the making of the agreement, and a mortgage of goods and chattels for securing the repayment of *such* advances.

2. The case of a mortgage of goods and chattels for securing the mortgagee against the *endorsement* of any bills or promissory notes, or any *other* liability by him

incurred for the mortgagor, not extending for a longer period than one year from the date of the mortgage.

The two things are perfectly distinct. The one is an *agreement* for future advances. The other a liability for a past or concurrent endorsement or other ascertained liability.

The latter would appear to have been inserted in the section after the introduction of the Bill to the Legislature, without adequate alteration of language being made in the section to meet the necessity for change caused by the insertion.

Hence there is some difficulty in deciding how much of the section applies to the one case and how much to the other.

It is necessary to the validity of the mortgage, not only that it be executed in good faith, but where it is to secure a person entering into an agreement for *future* advances, that it set forth fully by recital or otherwise the terms, nature and effect of the *agreement*, and the amount of the *liability* intended to be created.

It is also necessary to the validity of the mortgage, in such last mentioned case, that it be accompanied by an affidavit of the mortgagee or his agent, stating "that the mortgage truly sets forth the *agreement* entered into between the parties thereto, and truly states the extent of the *liability* intended to be created by *such* agreement, and covered by such mortgage": sec. 5, and "that such mortgage is executed in good faith, and for the express purpose of securing the mortgagee repayment of his *advances*," and "not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor, nor to prevent such creditors from recovering any claims which they may have against such mortgagor": *Ib.*

In the case of a mortgage to secure the mortgagee against liability under an endorsement, it is clear from the use of the words "as the case may be," that different language must be used, viz., that the mortgage is to secure the mortgagee "against the payment of the amount of his

liability for the mortgagor," but it is not clear that in such case any recital of a pre-existing agreement is made necessary in the mortgage, or necessary to be verified by affidavit.

In either case, however, it is clear the affidavit must negative that the mortgage was "for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor," or "to prevent such creditors from recovering any claims which they may have against such mortgagor."

The objection to the mortgage is, that it contains no recital of the terms, nature, and agreement, or of any agreement between the parties to it, but only a recital of the fact that the plaintiff had endorsed a certain promissory note for the mortgagors, which note the mortgage does not identify, nor does the mortgage shew any liability on the part of the plaintiff to pay the same.

The mortgage is not to secure an agreement for future advances, but to secure the mortgagee against an endorsement of a promissory note for \$1,000, at the request and for the accommodation of the mortgagors, which note was made by the mortgagors, and bears even date with the mortgage, and is payable three months after date, to Charles Beatty, or order. The mortgage is upon condition that the mortgagors "shall well and truly pay the said note at maturity, and indemnify and save harmless the said mortgagee against his endorsement of the said promissory note." The covenant is, "to indemnify and save harmless the said mortgagee against the endorsement thereof."

If an agreement of any kind be necessary to appear in such a mortgage, it may, in the language of the section, appear by "recital or otherwise."

If necessary, it sufficiently appears that the mortgagee, at the request of the mortgagors, endorsed a promissory note for \$1,000, and that in consideration thereof the mortgagors agreed to indemnify him by the giving of the mortgage; and that the mortgage in such a case is, upon

the authority of *Mathers v. Lynch*, 28 U. C. R. 354, sufficient as against the objection taken.

The objection to the affidavit of the mortgagee is, that it does not state "that the mortgage truly sets forth the agreement entered into between the parties, and does not truly state the extent of the liability intended *to be* created by such agreement and secured by such mortgage," and "that the said mortgage was executed in good faith, and for the express purpose of securing the mortgagee against the payment of the amount of his liability."

The first part of this objection appears to us, for reasons already expressed, to be aimed against a mortgage to secure an agreement for *future* advances and a liability to be created, and not where the mortgage is designed as an indemnity against an endorsement, or other past or concurrent ascertained liability.

Besides containing the general allegation that the mortgage was not made for the improper purposes mentioned in the Act, the affidavit of the mortgagee begins by the assertion that the deponent "endorsed the promissory note in the said mortgage named." This is all that the mortgagee was required to do in order to entitle him to the benefit of the security, and this, in our opinion, is sufficient in the case of such a mortgage as against the objection taken.

The affidavit is also, we think, good as against the second part of the objection, for it states that "the said mortgage was executed in good faith, and for the express purpose of securing the due payment of the said promissory note, and securing indemnity to me against the endorsement, or any loss thereby." The words used in the statute are "against the payment of the amount of his liability." A statement that the mortgage was executed in good faith, and for the express purpose of "securing the due payment of the said promissory note," which is the liability secured against, is so exact an equivalent that, if it stood alone, we could not give effect to the objection. But when it is accompanied by the words, "and securing in-

demnity to me against the endorsement, or any loss thereby," we have all that the statute intended, in words more numerous than necessary for the purpose of the statute.

There is no objection specifically taken to the affidavit on the ground that it uses the phrase "for the purpose of *protecting* the goods and chattels mentioned in the mortgage against the creditors &c.," instead of the phrase, "for the purpose of *securing* the goods and chattels against the creditors," &c., and strictly speaking we are not called upon to notice the point, but we may say that it has not been overlooked, and if it were before us for decision, we would not be disposed to give any effect to it. See *Mathers v. Lynch*, 28 U. C. R. 354. See further, *Olmstead et al. v. Smith et al.*, 15 U. C. R. 421; *Valentine v. Smith*, 9 C. P. 59; *Boulton et al. v. Smith*, 17 U. C. R. 400, affirmed, 18 U. C. R. 458; *Harding v. Knowlson et al.*, 17 U. C. R. 564; *Fraser v. The Bank of Toronto*, 19 U. C. R. 381; *Mason v. Thomas*, 23 U. C. R. 305.

We do not feel at liberty to imagine fraud in a case where none is either imputed or suggested.

WILSON, J., concurred.

ARMOUR, J., was not present at the argument, and took no part in the judgment.

Rule discharged.

IN RE REVELL AND THE CORPORATION OF THE COUNTY OF OXFORD.

Assessment—Equalization of rates—32 Vic. ch. 36, secs. 71, 74—Quashing by-laws.

The council of a county, in passing by-laws to levy money for county purposes in 1877, apportioned the assessment of the different municipalities, not upon the basis of the value according to the rolls as finally revised and equalized for 1876, but according to the rolls for 1877: *Held*, that such by-laws were illegal, being contrary to sec. 74 of the Assessment Act 32 Vic. ch. 36, O., and must be quashed.

Remarks as to the propriety of quashing by-laws when clearly illegal, though the illegality may not be apparent upon their face.

Bethune, Q. C., on the 24th of August, 1877, obtained a rule calling on the county to shew cause why by-laws, 216, 217, 218, and 219, should not be quashed, on the ground that the apportionment of the sum to be levied upon the several municipalities in the by-laws mentioned is unequal and unjust; and on the ground that the county in making the apportionment of assessments in the by-laws, did not make the value upon the basis of the amount returned on the assessment of the townships, towns, and villages, as reported by the valuers, as finally revised and equalized for the year 1876, but upon the basis of the assessment rolls for the year 1877; and on the ground that the assessment rolls for 1877, upon the basis of which the apportionment was made, were not finally revised and equalized at the time when the said apportionment was made, and an order having afterwards been made, altering the equalization of the rolls of 1877, made by the County Council.

By-law 216, passed 14th June, 1877, raised \$21,632 for county, general, and school purposes.

By-law 217, passed 15th June, 1877, raised \$12,000 to pay interest on Credit Valley R. W. Co. bonus.

By-law 218, passed 14th June 1877, was to raise \$2,222 to pay interest on Port Dover Railway bonus.

By-law 219, dated 14th June, 1877, raised \$4,332 to pay interest and principal accruing due on Port Dover and Lake Huron Railway bonus.

September, 25, 1877. *Ball*, Q. C., shewed cause, and *Bethune*, Q. C., supported the rule. The arguments sufficiently appear in the judgment.

October 30, 1877, WILSON, J. In the argument it was admitted by Mr. Ball that if the rolls of 1876 were to be taken just as they were finally revised and equalized for the purpose of assessing and levying the rates of 1877, the rule must be made absolute; but if the rolls of 1876 are to be adjusted by the rolls of 1877, keeping the aggregate amount of the rolls of 1876 at the same sum at which they were settled and revised, but varying only the equalization of the different municipalities made in 1876, by a new equalization among them to be made in 1877 by the rolls of 1877, then the rule should be discharged.

The Assessment Act of 1869, sec. 61, makes the roll as finally passed by the Court of Revision valid and binding on all parties, except in so far as the same may be further amended on appeal to the Judge of the County Court.

By sec. 70, when, after the appeal, the assessment roll has been finally revised and corrected, the clerk of the Municipality shall, without delay, transmit to the county clerk a certified copy thereof.

Mr. *Bethune* contended that by sec. 74, the county should have apportioned the rates in question among the different townships, towns, and villages of the county, in order that the same might be assessed equally on the whole ratable property of the county, by making the amount of property returned on the assessment rolls of such townships, towns, and villages, or reported by the valuers as finally revised and equalized for the preceding year, the basis upon which the apportionment was made, and that the rolls of 1876 should have been used.

Mr. Ball contended that sec. 74 requires only that the rolls of 1876 shall be the *basis* upon which the apportionment, and that it is not to be the *amount* on which the apportionment is made.

And to ascertain upon what sum the apportionment is to be made, we must refer to sec. 71 of the Act.

That section provides "That the council of every county shall yearly, before imposing any county rate, and not later than the first of July, examine the assessment rolls of the different townships, towns, and villages in the county for the preceding financial year, for the purpose of ascertaining whether the valuation made by the assessors in each township, town, or village, for the current year, bears a just relation to the valuation so made in all such townships, towns, and villages, and may, for the purpose of county rates, increase or decrease the aggregate valuations of real and personal property in any township, town, or village, adding or deducting so much per centum as may, in their opinion, be necessary to produce a just valuation between all the valuations of real and personal estate in the county ; but they shall not reduce the aggregate valuation thereof for the whole county as made by the assessors."

The meaning of this section is, that "for the purpose of ascertaining whether the valuation made by the assessors in *each* township, town, or village, for the current year, bears a just relation to the valuation so made in *all* such townships, towns, and villages," the county council may examine the rolls for the preceding financial year, and may, "for the purpose of county rates," increase or decrease the aggregate valuations in any township. The valuations which they may increase or decrease are the valuations of the current year, and not of the preceding year.

That is to be done "for the purpose of county rates ;" but it does not say that it is for the rates of the current year, or of the year after, when the rolls of the current year will become for the purpose of rates the rolls of the preceding year.

The rolls in this case of 1876, are not to be altered by increase to or decrease from them by anything which appears in the rolls of 1877, but the contrary ; the rolls of 1877 are to be amended by an examination of the rolls of 1876, and that examination of the rolls of 1876 is for the purpose of ascertaining whether the valuation made by the assessors in *each* township, &c., for the current year, bears

a just relation to the valuation made in *all* such townships, &c.

How an examination of the rolls for 1876 will help the council to amend the rolls of 1877, I do not very plainly see. Nor can I tell why that examination of the rolls of 1876 is to be made "before imposing any county rate" in 1877, when no rate is to be imposed on the rolls of 1877 until the year 1878.

In this case the council have not this year added to the assessment of 1876, but to the assessment of 1877, which, in my opinion, is right.

But what seems singular is, that they have added two per cent. to the assessment made upon each municipality—that is, upon every municipality in the county—when that cannot, by any possibility, help to produce a just relation between all the valuations of real and personal estate in the county.

The council is empowered to increase or diminish the valuation on any township, &c., to produce a just relation of valuation between it and the other municipalities; but not to increase the aggregate of the county assessment by adding an *equal* per centage to the assessment of each of the municipalities. If they can do that they can double it by adding a hundred per cent.

Their powers are to equalize, to establish a just relationship of value, and not to add to the taxes without any regard to that object.

The county council having added the two per cent. all round to the assessments of each municipality, have raised the assessment of the county for the purpose of rating to \$23,473,417, and they have levied the rates for this year upon that sum. That is in direct violation of the statute which declares the council shall take the roll of 1876 as the basis for the rating of this year. The clerk says expressly that is what was done.

Mr. Ball contended that even if that were so the Court should not interfere, because the amounts were so nearly alike that it made but little difference.

I find the assessment of 1877 was.....	\$23,013,154
The 2 per cent. was.....	460,263

Total.....	\$23,473,417
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And that the assessment 1876 was.....	\$23,018,675
The difference being.....	\$454,742

And as the sum required to be raised by the different by-laws, which are impeached amounts to \$45,672, the amount raised on the excess of \$454,742, is only \$885, and the amount raised in each municipality is only a divisional part of that amount. It was said, however, that there was more injustice done to some of the municipalities than a mere equal distribution of the \$885 would amount to.

In the case of Woodstock, if the roll of 1876 were taken, its share of these rates would be \$1,090.60.

If the roll of 1877 be taken, as settled by the council, its share would be \$1,294.50.

And its share on the last roll, as stated by the County Judge, would be \$751.50.

And as the larger of these sums was directed to be raised for Woodstock, that in any event it was called upon to pay, at the least, more than \$200 above its proper proportion.

I have nothing now properly to do with the action of the County Judges or the County Judge, upon the appeal to them or to him for the valuation and equalization of the county council. What these Judges, or one of them, did, was to settle the equalization of the roll of 1877, and that is not affected by the by-laws which are, or must be assumed to be based upon the rolls of 1876, if the by-laws are maintained.

The mode of equalization adopted on appeal may bring about a just result: but I cannot say *a priori* that it should do so.

And whether the two Judges of Elgin and Oxford acted together, under the 39 Vic. c. 14, or one of them alone acted, I need not say, for it is the by-laws which are impeached; and, also, whether they are based upon the assessments

of 1876 or not, and not their action upon the assessments of 1877, that I am called upon to decide.

Whether the Judges acted rightly, if the two acted together, and whether they adopted the proper way of effecting an equalization, may probably be raised by mandamus, if it be thought advisable to do so.

It appears also in the case that the assessments for the county for 1876 were \$23,018,675, and that the county council by by-law reduced them to \$22,175,771—while sec. 71, before referred to, says expressly “they shall not reduce the aggregate valuation thereof on the whole county as made by the assessors.”

That by-law, being of more than one year's standing, cannot be quashed by the Court. But it does not follow that if the county council make the true and legal amount of that year's assessment the basis for apportioning the rates among the municipalities, that the Court will quash their by-law which does so; when, perhaps, they might be more correct if they acted upon the lower valuation.

The county have admittedly not acted upon their equalization of 1876, but upon the larger sum, the amounts returned by the assessors for that year, so that in truth they have not recognized the equalization of 1876 at all.

The county council has not, if sec. 71 allowed it, increased or decreased the rolls of 1876 they have deliberately made the apportionment under the by-laws in question upon the rolls of 1877. The county clerk said “the calculations upon which the sums named in by-laws 216 to 219 inclusive were made, were made under my directions. They were calculated from the last column of the report in page 16 of the June proceedings of the county council.

That is wholly unwarranted, as Mr. Ball himself admits. As the parties have not been able to come to a settlement, I am obliged to make the rule absolute to quash the by-laws with costs.

From this judgment the county appealed, and the motion was reheard in this term, December, 3, 1877.

McMichael, Q. C., and *Ball*, Q. C., for the county.

Bethune, Q. C., contra.

December, 28, 1877. HARRISON, C. J.—The first question is, whether the by-laws moved against are illegal.

The principal ground of objection to the by-laws, all of which were passed in 1877, is, that the council of the corporation of the County of Oxford, in making the apportionment of assessments in the by-laws, did not make the value upon the basis of the amount returned on the assessment of the towns and villages, as finally revised and equalized for the year 1876.

If the provisions of the statute have been disregarded by the county council, it may be that there is no obligation on the part of the local municipalities to pay county rates; and so it is important, to ascertain the meaning of the Legislature, and to decide whether the provisions of the statute have been followed by the county council for the purposes of the county rate: See *Corporation of the County of Lincoln v. Corporation of Niagara*, 25 U. C. R. 578.

Municipal councils are the creatures of the statute law, and possess only such powers as that law expressly confers upon them, or such as are implied because necessary to carry into effect the powers expressly conferred: *Hodges v. City of Buffalo*, 2 Denio 110, 112.

When the Legislature has prescribed a particular mode for the exercise of the powers conferred, it is not allowable for a municipal council to adopt a different mode, and endeavor to sustain it, because, in their opinion, substantially the same as the mode prescribed: *The City of Placerville v. Wilcox*, 35 Cal. 21.

The Assessment Act, 32 Vic. ch. 36, sec. 76, directs that when a sum is to be levied for county purposes, or by the county for the purposes of a particular locality, the council of the county shall ascertain, and by by-law direct, *what portion* of such sum shall be levied in each township, town, or village, in such county or locality.

The same Act, sec. 74, declares that the council of a county *in apportioning* a county rate among the different townships, towns, and villages, within the county, *shall*, in order that the same may be assessed equally on the whole ratable property of the county, make the amount of property returned on the assessment rolls of such townships, towns, and villages, or reported by the valuator as finally revised and equalized for the preceding year, *the basis* upon which the apportionment is made.

The declaration is not that the amount returned, as finally revised and equalized for the preceding year, together with something else, shall be *a* basis, but that the amount so returned, and so finally revised and equalized, shall be *the* basis.

The declaration is not, that subject to such revision or equalization as the county council think necessary, such amount shall be *a* basis, used in the sense of an approximation, but *the* basis upon which the apportionment is made.

The word "basis," as used in this section, means, and can only mean, the foundation, the whole and only foundation, of the apportionment.

The argument against this construction is, that sec. 74 is controlled by sec. 71, which provides that the council of every county shall yearly, before imposing any county rate, and not later than the first day of July, examine the assessment rolls of the different townships, towns, and villages, for the preceding financial year, for the purpose of ascertaining whether the valuation made by the assessors in each township, town, or village, for the current year, bears a just relation to the valuations so made in all such townships, towns, and villages, and may, for the purpose of county rates, increase or decrease the aggregate valuations of real and personal property in any township, town, or village, adding or deducting so much per centum as may, in their opinion, be necessary to produce a just relation between all the valuations of real and personal estate in the county; but they shall not reduce the aggregate valuation thereof for the whole county.

This section is not in conflict with sec. 74, nor is it, in our opinion, at all designed to control or interfere with the direct and unequivocal language used in sec. 74.

Two things are indispensable to the working of this branch of the assessment law. The one is, that yearly there shall be an equalization for the purpose of producing a just relation between the assessments of all the local municipalities of the county. The other is, that when this is yearly accomplished, it shall be ready for use whenever it may, under the statute, be *properly* used.

There is nothing in sec. 71 which declares that the machinery thus provided shall, in the year when provided, be used as "the basis" of county taxation for *that* year.

The machinery, as a matter of fact, is never complete till the year is well advanced, and would not, under any circumstances, be available for county rates in the first half of the year. It could not, therefore, in the first part of the year be made the basis for county taxation for that year. But if there be provided any other basis for that year, it will not be the less ready for use in the year following.

Now this is what we think the Legislature intended when, in s. 74, enacting that the amount of property returned on the rolls as finally revised and equalised for the preceding year, shall be the basis of apportionment for the current year.

The basis in the year in which the apportionment is to be made, is not to be a fluctuating one according to the caprice of the council for the year, but one perfected in the preceding year by the the council of that year, and only subject to amendments, if any, made on an appeal to the County Judge.

While it is the duty of the council of the current year to equalize the assessment rolls of the current year, it is, equally their duty, when apportioning a county rate, to make the equalized and revised rolls of the preceding year the basis of the apportionment. In other words, while it is the duty of the county council, for the

purpose of county rates, to equalize the rolls of the current year, that equalization is for use, not in the current, but in the next succeeding year.

We are, therefore, of the clear opinion that the by-laws moved against are illegal.

The next question is, whether they ought to be quashed. If illegal, they are void. If there be the power to quash them, abstaining from the exercise of the power cannot impart any validity to them. Although the Court, in *Re Secord and County of Lincoln*, 24 U. C. R. 142, refused to quash the by-law moved against, the only effect of the refusal was, to drive the parties to other and more expensive litigation, in the result of which the by-law although not quashed, was treated as a nullity.

There was a time when there was no appeal from the decision of the Court quashing or refusing to quash a municipal by-law. See 12 Vic. ch. 63 sec. 40, and 20 Vic. ch. 5 sec. 18. When this was the case, the Court might well say, instead of setting aside the by-law, we shall leave the parties to an action, and in the event of an action our opinion will be subject to review by a Court of Appeal. But this reason no longer exists. The appeal now may be from a rule quashing or refusing to quash a by-law, as effectually as from the granting or refusal by the Court of a rule in a civil action: See Consol Stat. U. C. ch. 13 sec. 28, as amended by 34 Vic. ch. 11 sec. 2, O.

If the Court merely doubted the legality of a by-law moved against, it would of course be the duty of the Court not to interfere with it, but where there is no doubt as to the illegality, there is *prima facie* a good reason for quashing the by-law.

It is of more importance to the correct and efficient working of our municipal institutions that illegal by-laws, when properly moved against, shall be quashed, than they be allowed to appear to exist when in truth they have no existence, and their apparent existence is a delusion, and may be a snare.

The power of the Court is to quash by-laws for *illegality*. The Act, as regards the exercise of the power, does not, in words, draw any distinction between by-laws illegal on their face and illegal *aliunde*. But where the illegality is *dehors* the by-law, the Courts in the past have been more reluctant to exercise the discretionary power to quash than when the illegality appears on the face of the by-law.

In *Grierson and Ontario*, 9 U. C. R. 623, 632, Burns, J., said: "I am of opinion that the true construction to give to the powers vested in the Court to quash by-laws, is, that unless the by-law be illegal on the face of it, it rests discretionary with the Court upon extraneous matters to say whether there is such a manifest illegality that it would be unjust that the by-law should stand, or that it had been fraudulently or improperly obtained."

This language was adopted by Draper, C.J., in *Re Secord and the County of Lincoln*, 24 U. C. R. 142, as affording a rule for the exercise or non-exercise of the discretionary power to quash vested in the Court.

But where the power is conferred without any expressed limitation, except as regards the necessity for the preliminaries to the exercise of the power being regular, it is not possible to lay down a rule which will be found to work equally well in all cases, or even in the majority of cases.

Where, on an application to quash a by-law, the Court entertains no doubt as to its illegality, it is generally better at once to say so, and saying so, to follow up the expression of opinion with the appropriate legal consequence—the quashing of the by-law.

If it were made to appear that something had been done under the by-law which ought to be sustained, and which would be sustained in the event of the refusal of the Court to exercise its power, there would be some reason for abstaining from its exercise. But where the by-law, whether quashed or not, is a void proceeding, and so can sustain nothing, the sooner it is out of the way the better.

for all, except those interested in the maintenance of imposture.

We are of opinion that the decision of Mr. Justice Wilson must be affirmed, with costs.

WILSON, J., and ARMOUR, J., concurred.

Judgment affirmed.

MEMORANDA.

During Michaelmas Term, JOHN DOUGLAS ARMOUR, one of her Majesty's Counsel learned in the law, was appointed one of the Judges of the Court of Queen's Bench, in the place of the Hon. Mr. JUSTICE MORRISON, who was appointed a Judge of the Court of Appeal.

During this term the following gentlemen were called to the Bar :

TALBOT MACBETH, JOHN LANYON WHITING, KENNETH DINGWALL, RALPH WINNINGTON KEEFER, ALEXANDER DUNCAN CAMERON, WALTER BARWICK, JOHN FRANKLIN MONK, WILLIAM BEAIRSTO, JOHN WINCHESTER, THOMAS DALZIEL COWPER, GEORGE JOSEPH O'DOHERTY, SILAS CORBET LOCKE, FRANK MADILL.

SITTINGS IN VACATION

AFTER MICHAELMAS TERM, 1877.

JOHN NASMITH v. JAMES ISAAC DICKEY, NATHANIEL
DICKEY, AND JOHN NEILL.

*R. W. Co.—Action by judgment creditor against shareholder—C. S. C. ch. 66,
sec. 80.*

Sci. fa. on a judgment against a R. W. Co., alleging that defendants held thirty shares therein, on which \$1800 remained unpaid. Plea, for a defence which arose after this action, alleging payment of \$1800, the balance due on defendants' stock, to one G. H., a judgment creditor of the company, under a judgment recovered by him against defendants as shareholders. Replication, that G. H. was a creditor only in respect of a claim which he held as trustee for the defendant N. D., and recovered his judgment, and received the money paid to him, as such trustee, of which defendants had notice.

Held, a good replication, for the payment to N. D., a shareholder, was of no avail as against the plaintiff, an outside judgment creditor.

DEMURRER. *Sci. fa.* on a judgment recovered by plaintiff against the Toronto Grey & Bruce R. W. Co., on the 15th August, 1877, for \$5,582, which was unpaid, and alleging that defendants held 30 shares in the said T. G. & B. R. W. Co., in respect of which \$1800 remained unpaid.

Fourth plea, for a defence which arose after the commencement of this action: That there does not remain due on and in respect of each of the said shares towards the capital stock of the the said company the sum of \$60, in all \$1800, together with interest from the 1st January, 1874, or any sum whatever, inasmuch as one Glover Harrison, then being a creditor of the said T. G. & B. R. W. Co., recovered a judgment against the said T. G. & B. R. W. Co. in the Common Pleas at Toronto on the 17th day of February, 1876, for the sum of \$1800, and thereafter a writ of *fi. fa.* was issued upon the said judgment,

directed to the sheriff of the county of York, against the T. G. & B. R. W. Co., commanding him to levy of the goods and chattels of the said company in his bailiwick the sum of \$1877.50, to which the said sheriff returned *nulla bona*, and which said writ of *fi. fa.* and return of *nulla bona* endorsed thereon, has been returned to, and is now of record in, the said Court of Common Pleas. And the defendants further aver that thereafter the said G. H. instituted an action against these defendants, who were shareholders, holding shares in the capital stock of the said company, on which said shares there were remaining due the sum of \$1800 and no more, and the said G. H. prosecuted the same to judgment, and thereupon the said defendants paid to the said G. H. the sum of \$1800 in full of his said judgment, and of the balance then remaining due on the said stock of the said defendants, and they also paid his costs of suit. And the defendants further aver that the whole amount of their stock in the said company is paid up, and there does not now remain anything due in respect thereof.

Second replication to the third plea, that G. H. was a creditor, as in said plea mentioned, only in respect of a certain claim or cause of action which he held as trustee for the said defendant, Nathaniel Dickey, and the said judgment first in said plea mentioned was recovered by the said G. H., solely upon and in respect of said claim or cause of action hereinbefore mentioned, and as trustee for said N. D.; and the said G. H., instituted and prosecuted to judgment the said action against the now defendants in said plea mentioned as trustee of and for the said N. D., and the now defendants did not defend the said last mentioned action, but suffered and permitted judgment to be recovered thereon against them by default. And the said G. H. never had any beneficial interest in the said claim or cause of action firstly in this replication mentioned, or in the said judgment, or either of them, or in the moneys, or any or either of them, or any part thereof, recovered by the said judgments, or either of

them. And all proceedings had or taken by the said G. H., as in said plea mentioned, were so had and taken by him as such trustee of and for the said N. D., and at the request, cost and expense, and for the sole benefit of the said N. D., who was at all times the equitable and beneficial owner of the said claim or cause of action firstly herein mentioned, and of the said two judgments herein and in the said fourth plea mentioned. And no person or party other than the said N. D. ever was beneficially interested in or entitled to the moneys, or any or either of them, or any part thereof, recovered by the said judgments, or either of them. And the said moneys paid by the defendants to the said G. H., as in said plea mentioned, was so paid to, and received by him as trustee for the said N. D., and for his, the said N. D.'s sole use and benefit. And the defendants at all times had full notice and knowledge of all the facts in this plea mentioned.

Demurrer to the replication, on the grounds: that it shews no reason why N. D. or G. H. should not recover judgment against the defendants for the amount due on a judgment recovered against the company, and why payment of said judgment is not payment of the amount due by the defendants on their said stock.

January 11, 1878. *J. K. Kerr*, Q. C., for the demurrer. N. Dickey had a right to assign to G. Harrison, and he having an unsatisfied judgment against the company could sue any shareholder of the company. There is nothing in the law or cases to prevent it. He cited *Burke v. Dublin Trunk Connecting R. W. Co.*, L. R. 3 Q. B. 47.

Richards, Q. C., contra. N. Dickey can be no better off than the other shareholders in the concern in which all are partners. He cited *Benner v. Currie* 36 U. C. R. 411; *McGregor v. Currie*, 26 C. P. 55.

January 15, 1878. HARRISON, C. J.—The defendants are sued as being stockholders in the Toronto, Grey, and Bruce Railway Company.

The Toronto, Grey and Bruce Railway Company is incorporated by 31 Vic. ch. 41, O., the second section of which incorporates, among other clauses of the Consol. Stat. ch. 66, the clauses with respect to "shareholders."

Of these, clause 80 is as follows:—"Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities thereof, and until the whole amount of his stock has been paid up; but shall not be liable to an action therefor before an execution against the company has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholders."

This clause received an interpretation in the Court of Appeal in *Macbeth v. Smart*, 14 Grant 298, which, although opposed to the views of the Equity Judges who took part in the decision, but who were in the minority, must be accepted as the law.

Draper, C. J., one of the majority, after quoting clause 80, at p. 310, is reported to have said "Nothing can be clearer than this language, both as regards the liability of the shareholder and the remedy of the creditor of the company; the former is subject to an individual liability for an amount equal to the amount unpaid upon his shares *until* the whole amount of his stock *has been paid up*; the latter has the right to recover from the shareholder the amount due upon the execution against the company, provided always that so much is unpaid upon the shares."

The same distinguished and lamented Judge, at p. 317, is reported to have said, "It rests upon this, that when the amount of unpaid stock constitutes the sole remaining fund for payment of debts of the company, shareholders, although they are creditors, must pay in whatever calls are made to the extent of their unpaid stock *before* they are entitled to a dividend in common with other creditors."

It is pointed out both by Draper, C. J., and Hagarty, C. J., in accordance with the opinion of Lord Chelmsford under

a similar statute in *Grissel's Case*, L. R. 1 Ch. 528, that any other construction of the clause would have the effect of withdrawing altogether from *outside* creditors part of the funds applicable to the payment of their debts, and would thereby create preferences in favour of creditors who are also shareholders in the company.

The only effective answer, therefore, which a shareholder sued by a creditor under the statute can make, is, that in some manner "the whole amount of his stock has been paid up." See *Woodruff v. Corporation of the Town of Peterborough*, 22 U. C. R. 274.

This is the construction which the clause has since received from the Privy Council in *Ryland v. DeLisle*, L. R. 3 P. C. 17.

The only recent English case which has a contrary bearing is, *Brighton Arcade Company, limited, v. Dowling*, L. R. 3 C. P. 175; but this case was disapproved of by the Lord Chancellor and other Justices of Appeal, in *Re Paraguassu Steam Tramroad Co., Black & Co.'s Case*, L. R. 8 Ch. 254.

The Lord Chancellor, at p. 262, when dealing with the contention that some thing other than actual payment will satisfy such an Act, said: "The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would, in effect, be, to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors."

Now the question is, whether the facts disclosed in the fourth plea, pleaded as it is for a defence after the commencement of the action, and the second replication thereto, constitute payment by the defendants of the amount of their stock so as to exclude the plaintiff, an outside creditor, from all participation in so much of the trust fund as is represented by the amount of the defendants' subscribed stock?

In the consideration of this question, we may simplify matters by substituting the defendant Nathaniel Dickey

for Glover Harrison, who, it is admitted, was a creditor only in respect of a certain claim which he held as trustee for the defendant Nathaniel Dickey. Can it then be held that Nathaniel Dickey, who is a shareholder in the stock of the company, and as between himself and other creditors responsible for the whole amount of the stock subscribed by all the creditors, is such an outside creditor as to entitle him, although a shareholder in the company, to withdraw a portion of the trust fund, and to that extent pay himself in full the amount of his demand against the company? This is the question for decision.

The defendant in *Benner v. Currie*, 36 U. C. R. 411, before action assigned his demand against the company to one Fletcher, who, as a trustee for him, recovered a judgment against the company; but this was held not to place the defendant in any better position than if it had not been done.

Mr. Justice Gwynne, in delivering judgment, said, at p. 417: "The first judgment creditor who makes use of the statutory remedy to reach the assets of the company must prevail, and if the shareholder, who is also a judgment creditor, cannot, by reason of his being a shareholder, reach with an execution his own unpaid stock, that circumstance is not to deprive the *outside* judgment creditor of the remedy which the statute gives him."

The same defendant, in *McGregor v. Currie*, 26 C. P. 55, endeavoured to strengthen his position by averring a payment of the amount of his stock to Fletcher; but it appearing that the judgment recovered by Fletcher against the company was for the benefit of the defendant, the latter was again defeated.

In delivering judgment, Hagarty, C. J., said, at p. 58: "I consider the cardinal point in the legislation on this subject to be, that the unpaid stock is the fund to which the *outside* creditors trust and have to look, and that *no one of the partners as shareholders in the joint adventure* can claim any debt against his fellows so long as these creditors remain unpaid. The unpaid

stock is a part of the assets of the concern. These assets must go towards the full satisfaction of the creditors before we can allow of their claiming (as against *such* creditors), one shareholder against the others; as under the old Bankrupt Law, there could be no proof by parties *inter se* until the creditors of the firm paid twenty shillings in the pound. * * * The defendant has in substance not paid his stock."

The law on this point is thus concisely stated, at p. 1224 of the third edition of the present Mr. Justice *Lindley's* valuable work on Partnership: "Subject to the exceptions which will be hereafter stated, it is an established rule that a partner in a bankrupt firm shall not prove in competition with the creditors of the firm. They are in fact his own creditors, and he cannot be permitted to diminish the partnership assets to the prejudice of those who are not only creditors of the firm, but also of himself."

It is only necessary to add that there is nothing in the present case, treating it as one of *quasi* partnership in a joint adventure, to bring it within any of the exceptions stated.

Even if I dissented (which I do not), from the principle of the decisions to which I have referred, I would be bound by them.

That principle is not simply that a creditor of a joint stock company, who is also a stockholder, shall not be allowed to set off his demand against the company as an answer to the claim of an outside creditor, but that no such creditor shall be allowed to do any act which would have the effect in the event of the insolvency of the company of giving himself a preference at the expense of the outside creditors, for whose benefit the general fund is created, in the event of their being no other available assets.

Men are induced, or supposed to be induced, to give credit to incorporated joint stock companies, because, among other things, of an imposing list of shareholders. These shareholders, as between themselves, are substantially,

although if not legally, partners in the joint concern. If it succeed, they reap the profits of its success. If it fail, they should bear the burden to the extent of their limited liability. An attempt by a shareholder after the concern has become unable to pay its debts in full, by any device whatever, to recover payment of his own demand in full is not one to be encouraged.

While I concede that payment in good faith by a shareholder to an outside judgment creditor, is for the purposes of the Act, and to the extent of the payment, a satisfaction of the amount of his liability, as a shareholder—See *Burke v. The Dublin Trunk Connecting Railway Co.*, L. R. 3 Q. B. 47—I cannot admit that a creditor of a company, who is also a shareholder of the company, is an outside judgment creditor for any such purpose.

Such a creditor certainly does not become an outside judgment creditor by attempting to cover himself up with the cloak of another man, to whom without value he has assigned his demand, where the cloak, by reason of the circumstances attending the transfer, is so thin as fully to admit the scrutinizing gaze of a Court of Justice.

Notwithstanding the use of the cloak in this case, the naked deformity of the defendant Nathaniel Dickey, in the dual position of a shareholder and creditor of the company, is so apparent as to render the attempted defence of the payment by all the defendants to him perfectly nugatory as against the plaintiff an outside judgment creditor.

In my opinion the replication to the third plea, or plea pleaded as a defence after the commencement of the action, is good, and there must be judgment for the plaintiff on the demurrer to that replication.

Judgment for plaintiff.

IN THE MATTER OF JOSEPH REUBOTTOM AND THE CORPORATION OF THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

Temperance Act of 1864—Voters' lists and assessment rolls.

AN application was made to quash a by-law passed under the Temperance Act of 1864 by the united counties of Northumberland and Durham, by a majority of 2752, on the ground that the assessment rolls and not the voters' lists were used throughout the counties, and that in four municipalities the assessment rolls of 1877 were used instead of those of 1876. It was not attempted to be shewn however that the result of the voting would otherwise have been different; and the rule therefore was discharged, with costs.

Quære, whether the objection was valid, or whether, notwithstanding the 40 Vic. ch. 12, O., making the voters' list applicable to municipal elections, the vote, according to *Lake and the Corporation of Prince Edward*, 26 C. P. 173, should not still be taken as prescribed by the Temperance Act.

Where a rule asks to quash a by-law on the ground that the poll was illegally taken, and there was no valid poll taken, and that the assessment rolls were used instead of the voters' lists, and the rolls of the wrong year, the applicant is confined to the specific illegality pointed out as regards the poll.

DECEMBER 14, 1877. *H. Cameron*, Q. C., upon reading a certified copy of the by-law, obtained a rule, at the instance of the above named Joseph Reubottom, calling upon the corporation of the united counties of Northumberland and Durham to shew cause why a by-law, No. 424, of the said corporation, intituled "A by-law to prohibit the sale of intoxicating liquors, and the issue of licenses therefor," should not be quashed with costs, on the grounds that the poll of the municipal electors of the said united counties was illegally taken upon the said by-law, and that there was no valid poll of the said electors taken thereon, and that the assessment rolls for the said county were used at the taking of such poll instead of the voters' lists, and that the rolls used were not the last revised rolls, but were those for the year 1877, which were not finally revised.

The facts are fully set out in the judgment.

January 25, 1878, the case was argued before Gwynne, J., sitting for the full Court.

Bethune, Q. C., and Osler, shewed cause. The statute does not require anything beyond advertizing in some one newspaper in the county, which was done here. As a matter of fact, however, much more was done; the council had 500 half sheet posters, containing the by-law and the day of polling, struck off and circulated throughout the counties. The votes polled did not appear large compared with the total number of electors, but harvest was going on, and that accounted for the small vote. Both sides used the assessment rolls, and even if they were wrongly used, the Court would not quash the by-law, unless it could be shewn that a different result would have been arrived at by the use of the voters' lists, if they were proper. But it is clear they were not. At the time the Temperance Act of 1864 was passed, there was no provision for voters' lists, and the Provincial Legislature was quite incompetent to alter the provisions of that Act, which, being a Dominion law, could only be changed or modified by the House of Commons. The Voters' List Act, therefore, does not apply to the voting on a Dunkin by-law. The local Legislature cannot alter the machinery for carrying out the Temperance Act. It is therefore evident that the last revised assessment rolls were the proper references for voting, and in this case the by-law was not submitted till after the period prescribed by law for the final revision of the assessment rolls. No prejudice has happened to any person in consequence of the voters' list not being used. The extra votes given by the use of the rolls, if struck off or added to the other side, would not give them a majority. The difference in the number of votes was 261, which if all were given to the opponents of the bill, would still leave them in a helpless minority. Most of the cases under this Act are collected in *Re Malone* and *The Corporation of the County of Grey*, 41 U. C. R. 159.

Hector Cameron, Q. C. contra. The Dunkin Act provided that the votes should be taken of the qualified municipal electors. At the time of passing the Dunkin Act, qualified voters were those described on the assessment

roll as being possessed of certain property. Since then the Ontario Legislature has declared that the qualified municipal electors shall be those whose names are on the assessment rolls and the voters lists. The local Legislature has in fact declared not only who are qualified municipal electors, but also who are Dominion electors. Revised Statutes, ch. 174, secs. 70, 76. The Dunkin Act, moreover, provided that a Dunkin by-law must be submitted to the municipal electors, and the Ontario Legislature can define what constitutes a municipal elector. If the contention on the part of the counties is right, then the qualification of voters on the Dunkin Act would be different from the qualification for municipal voters, as since the framing of the Dunkin Act the qualifications for ordinary voters has been lowered. It cannot be necessary to go further than to shew that in a vast municipality like the united counties of Northumberland and Durham the wrong basis of voting was employed. By-laws have before this been set aside for irregularities of form and procedure. It was impossible to calculate what the result would have been had the voters' list been used and proper advertising notice given. In the case of *Re Macæ and The Corporation of the County of Frontenac*, 42 U. C. R. 70, a by-law was set aside for insufficient publication of notice.

The facts of the case are set out fully in the judgment.

January 29, 1878. GWYNNE, J.—A rule framed as this is must be taken as limiting the general objection of illegality alleged in the beginning of the rule to the particular points after stated,—thus, that the taking of the poll was illegal in this, that, &c.

The rule was obtained upon the affidavit of Joseph Reubottom, to the effect that the assessment rolls used in the municipalities of Cartwright, Darlington, Bowmanville, and Newcastle, in the said united counties, were those for the year 1877: that on the 21st day of September last the Court of Revision for Newcastle, one of the municipalities of the united counties where polling took place on the said

by-law, added the names of A. A. Drummond, Mark Reverley, and F. Pope, to the assessment roll for the year 1877 for that municipality: that previous to the vote being taken in the town of Bowmanville on the said by-law no voters' list for the year 1877 for that municipality had been posted in the office of the clerk of the said municipality, or in any other place in the said municipality of Bowmanville.

To this affidavit was annexed a certificate under the hand of the county clerk, and the seal of the county, shewing the number of votes polled for and against the by-law in each municipality in the united counties, by which it appeared that out of 5,387 total votes, 4,050 polled for the by-law, and 1,337 against, giving a majority of 2,752 in favour of the by-law, and that in the municipalities particularly named in the affidavit the vote stood as follows, namely, in Cartwright, total vote polled, 183, of which 133 were for, and 50 against. In Darlington, total vote polled 420, of which 357 were for and 63 against. In Bowmanville, total vote polled 398, of which 207 were for, and 191 against. And in Newcastle village, total vote polled 141, of which 84 were for, and 57 against.

The objections, then, to the by-law which the rule so issued must be construed as bringing up for consideration, must be taken to be that throughout the counties generally the assessment rolls, and not the voters' lists were used; and secondly, that in the four municipalities named the assessment rolls so used were those of 1877, which, it is said, were not then revised and corrected, and that therefore if rolls could be used it should have been those of 1876 which should have been used.

Upon the 9th of January, upon an occasion of the rule being enlarged at the instance of the corporation, an application was made by counsel for the applicant for leave to file a further affidavit of Mr. Hutchinson, the applicant's solicitor, and to amend the rule by drawing attention to certain matters therein suggested. No decision was made upon the application further than that the matter

involved in it was reserved to the hearing, leaving it to the discretion of the Judge who should hear the case to determine the matter.

That application was renewed at the argument, and objected to on the ground that what Mr. Hutchinson deposes is no evidence. Mr. Hutchinson, in his affidavit, to which is annexed a paper purporting to be certified by the warden of the county, merely deposes that the county clerk handed the annexed paper to him as giving a statement of the official count of voting on by-law No. 424. At the foot of this paper is set out a copy of a certificate as follows:—

“I certify that the above are the votes polled in each separate municipality within the united counties of Northumberland and Durham upon the by-law submitted under the Dunkin Act: that the total votes polled in the various municipalities in the said counties are 4,387, 4,050 being polled ‘yea,’ 1,337 polled ‘nay,’ making a majority of ‘yeas’ 2,752.

H. SOWDEN, *Warden*.

“E. A. MACNACHTAN, *County Clerk*.

“I certify the above to be a correct copy.

“E. A. MACNACHTAN, *County Clerk*.

Mr. Hutchinson's affidavit, that the clerk handed him the statement as giving a statement of the official count of voting on the by-law, does not afford any evidence that it is correct; but its accuracy need not be disputed, for so far as the paper does set out a statement of the official count it coincides with the certificate of the clerk under the seal of the county which had been filed when the rule *nisi* was granted, but in the copy of the statement now produced, are two columns which were not in the certificate produced when the rule was granted, and it is only for introducing the contents of these columns, and not for establishing the count of votes polled, that it is desired now to be used. One of these columns is headed “Total Voters,” which at the foot sum up to 14,047, which Mr. Cameron, for the applicant, desires to be taken as the actual number of qualified voters, but whether this is the number appearing upon the assessment rolls, or upon the voters' lists, is not

suggested. It might be the total number of persons assessed as appears on the rolls, and not only of those qualified to vote at municipal elections. The other column is headed "Roll voted on," under which is set down 1877 in every case but three, namely, Seymour, Hastings, and Cavan.

The affidavit of Mr. Hutchinson certainly does not supply evidence of the correctness of what is set down in these columns; it is not, therefore, receivable in evidence. I do not think, however, that, in so far as the statement of the roll used is concerned, any object can be served by rejecting it.

Mr. Hutchinson's affidavit further suggests that the newspaper in which it is admitted the notice of the by-law, and of the time and places of the voting to take place thereupon, namely, *The Millbrooke Messenger*, is a paper of but limited circulation.

The affidavit produced in reply to this application, alleges that, besides being published in *The Millbrooke Messenger*, the notice so published was copied therefrom into most, if not all, of the other newspapers published in the counties, and that, in addition to such publication, and to the posting of copies of the by-law in four of the most public places in each municipality in the county, the county council ordered that 500 half-sheet posters of copies of the said by-law, and notice of the day of polling, should be circulated in the several municipalities of the said counties in proportion to their population, which said number of posters was in good faith fairly distributed in pursuance of such resolution.

It is not suggested in fact there was not ample notice given so as to bring the matter to the knowledge of every municipal elector in the counties.

The statute under which the voting took place, viz., 27-28 Vic. ch. 18, in its 3rd section enacts that the same shall, before taking effect, be submitted for the approval of the municipal electors of the municipality. And by the 3rd sub-section of the 5th section it is enacted that the clerk or secretary-treasurer of the municipality shall attend thereat, that is at the polling place, with the assessment rolls of the

municipality then in force, or certified copies thereof. And sub-section 4 of section 5 enacts that each elector desiring to vote shall present himself in turn to the person presiding and give his vote, yea or nay, and every vote given shall be recorded in a poll book, but no person's vote shall be recorded unless he appears by the assessment rolls to be a duly qualified municipal elector.

It is contended that since the passing of 40 Vic. ch. 12, O., which is entitled "An Act to extend the Voters' Lists Act of 1876 to municipal elections, and otherwise to amend the said Act," it is the voters' list only, and not the assessment roll, which is to be resorted to for the purpose of determining who are the qualified municipal electors, and as such entitled to vote.

In *Re Lake and The County of Prince Edward*, 26 C. P. 173, the Court of Common Pleas held, upon an application of this nature, that 27-28 Vic. ch. 18 was in full force, unaffected by 36 Vic. ch. 48, sec. 231, or any other Act, and that the vote might be taken in the manner prescribed by the former Act, and that the machinery provided by the latter Act need not be resorted to. Unless subsequent legislation has altered the law, the judgment in that case must prevail.

The statute relied upon, 40 Vic. ch. 12, O., was passed to make the Voters' List Act of 1876 applicable to municipal elections, which had before been applicable to parliamentary elections only. The Act itself would seem to shew that, although the Voters' List Act of 1876 is thus made applicable to the election of municipal officers, it was not intended to apply to voting upon municipal by-laws, for section 18 introduces certain provisions relative to voting upon municipal by-laws, the subject matter of which have relation to, and can receive no sensible construction, except they be read in connection with another Act, namely, 39 Vic. ch. 35, intituled "An Act to provide for voting by ballot on municipal by-laws requiring the assent of the ratepayers."

The first section of that Act, in order to the proper construction of it, introduces the provisions of the Municipal

Institutions Act of 1869, by enacting that "forthwith after the day for taking the votes of the electors, with respect to a by-law which requires their assent, has been fixed under the provisions of section 231 of the Act respecting the municipal institutions in this Province, passed in the 36th year of Her Majesty's reign, the clerk of the municipal council, which proposed the by-law, shall cause to be printed, at the expense of the municipality, such a number of ballot papers as shall be sufficient for the purpose of the voting."

The Act then proceeds to provide for the votes being taken by ballot, but it is only to such by-laws as are referred to in the 231st section of 36 Vic. ch. 48, that this principle is applied. Now, that 231st section enacts that "In case a by-law requires the assent of the electors of a municipality before the final passing thereof, the following proceedings shall be taken for ascertaining such assent, except in cases otherwise provided for: 1. The council shall by the by-law fix the day, hour, and place for taking the votes of the electors thereon at every place in the municipality at which the elections of the members of the council or councils therein are held, and shall also name a returning officer to take the votes at every such place, and such day shall not be less than three, nor more than five weeks after the first publication of the proposed by-law as herein provided for." So that the provisions of 39 Vic. ch. 35, and of section 18 of 40 Vic. ch. 12, must be construed as being applied only to the by-laws mentioned in the 231st section of 36 Vic., and so do not purport to affect a by-law passed under 27-28 Vic. ch. 18. The decision, therefore, in *Re Lake and The County of Prince Edward* still governs, unless the introducing of the Voters' List Act of 1876 to municipal elections causes the vote taken upon this by-law, in which the assessment rolls and not the voters' list was used, to be void.

The voters' list is a list of the names of all qualified municipal electors in the municipality. In order to be put upon the voters' list, the name of the person to be put must appear upon the assessment roll, assessed for the necessary

property qualification; in other words, a person must be a duly qualified municipal elector, that is he must appear as such upon the assessment roll, before he can be put upon the voters' list. The voters' list is not what makes him a duly qualified municipal elector, although the statute introducing the voters' list may deprive a duly qualified elector of his vote, unless his name appears upon that list.

The list is a thing made for convenience in taking the election; and it is an extract simply from the assessment roll, entry upon which, for the necessary qualification, constitutes the qualified municipal elector. If the name of a person, assessed upon the assessment roll for the necessary qualification were omitted from the list by the clerk by accident or design, the qualified elector might be deprived of his vote, and yet be able to sustain an action against the clerk for depriving him of his vote, but it would be because of his being a duly qualified elector, and because of his being wrongfully omitted that the action could be sustained.

It is, indeed, the assessment roll which constitutes the qualified elector, and where it should be used instead of the voters' list, it would seem to be a harsh measure to avoid an election, unless it should appear that the votes of persons not duly qualified, or disqualified from voting by reason of their not appearing on the voters' list, were taken in such numbers as to affect the election.

As to the objection that if it is the assessment rolls and not the voters' lists which should have been used, the wrong rolls were used, I am not to assume where the rolls of 1877 were used, or those of 1876, that those rolls were not respectively the last revised and corrected rolls in the municipalities in which they were so respectively used. There is no evidence offered that they were not, except in the case of the village of Newcastle, in which it appears that the roll of 1877, which was used, had not been finally revised and corrected, there being appeals pending in relation thereto.

But whether or not the assessment rolls or the voters'

list should have been the documents used, or if assessment rolls, whether or not those of 1877 or 1876, should have been used, it has not been attempted to be shewn that the result upon the polling would have been different, and therefore upon principle as well as upon the authority of the cases cited, all of which are collected in *Malone and The Corporation of the County of Grey*, 41 U. C. R. 159, this rule must be discharged, and with costs.

In the view which I have taken it is unnecessary to enquire whether, if the Local Legislature had passed an Act specially relating to the Dunkin Act, providing that the machinery for taking the vote upon the by-law passed under that Act should be different from that provided by the Dunkin Act, as, for example, that it should be by ballot, and enacting that the persons authorized to vote should be a different class from that pointed to in the Dunkin Act, such local Act would or would not be *ultra vires*, although it only affected the mode of taking the vote, not touching the principle of the Act. This was Mr. Cameron's contention, but I express no opinion upon this point.

The rule is discharged, with costs.

Rule discharged.

From this judgment the applicant appealed, and the matter was reheard before the full Court in Hilary term.

February 14, 1878. *H. Cameron*, Q. C., for the appeal. *Bethune*, Q. C., and *Osler* contra.

March 15, 1878. WILSON, J.—Many authorities were cited. It is not necessary to give them or to review them, as we adopt as our own the judgment which was appealed from. The rule will be discharged, with costs.

HARRISON, C. J., and ARMOUR, J., concurred.

Appeal dismissed.

GRAHAM V. MCKERNAN.

Insolvent Act of 1875—Deed of composition—Confirmation of—Action by Insolvent after assignment.

To a declaration on the common counts, defendant pleaded that the plaintiff before action assigned, under the Insolvent Act of 1875, to an official assignee, in whom the alleged cause of action became vested. Second replication, that before action the assignee, in conformity with a deed of composition and discharge duly executed by the requisite proportion in number and value of the plaintiff's creditors, by deed duly transferred to the plaintiff all the estate vested in the assignee. Rejoinder, that the discharge was not duly confirmed by the Court or a Judge.

Held, on demurrer, replication bad, for not shewing that the discharge was confirmed, without which, by sec. 66 of the Act, it could have no effect; and that the rejoinder was good. *Seemle*, that the replication should have alleged also that the creditors signing had proved their claims, and represented at least three-fourths in value of the claims of \$100 and upwards which had been proved, as required by secs. 49 and 52.

The third replication was, that the causes of action were for goods bargained and sold by plaintiff to defendant after the assignment, and that the assignee had not interfered or required the defendant to pay him. *Held*, good.

DEMURRER. Declaration, on the common counts.

Third plea: that the plaintiff before action assigned to an official assignee under the Insolvent Act of 1875, and the alleged debts and causes of action became and were vested in the assignee.

Second replication to third plea: that before action the official assignee, in conformity with the terms of a deed of composition and discharge duly executed by the requisite proportion in number and value of the plaintiff's creditors, by deed duly transferred to the plaintiff all the estate and effects theretofore belonging to and then vested in the official assignee, by reason whereof the causes of action were duly vested in the plaintiff.

Third replication to third plea: that the causes of action are in respect of money payable by the defendant to the plaintiff for goods bargained and sold, &c., by the plaintiff to the defendant, at his request, subsequent to the making of the assignment to the official assignee, and the assignee has not interfered in this action or required the defendant

to pay him the moneys due in respect of the said causes of action.

Third rejoinder to second replication : that the discharge sought to be effected by the deed of composition and discharge was not before the commencement of this action duly confirmed by the Court or a Judge, in pursuance of the statute in that behalf.

Demurrer to third replication, on the grounds:—That the causes of action sued for are, by the assignment, vested in the assignee, and he exclusively can sue in respect thereof, and his not interfering, &c., is immaterial.

Demurrer to third rejoinder to second replication, stating, among other grounds of demurrer, that the fact of the plaintiff not having had his discharge confirmed by the Court or a Judge is immaterial, and does not affect the plaintiff's title under the deed of conveyance to him or his right to maintain this action.

Notice of exceptions to the second replication : that the deed to the plaintiff is not sufficient to re-vest the property in him without a confirmation of the deed of composition and discharge ; that it is not alleged the composition and discharge was executed by the requisite proportion in number and value of the creditors who had proved their claims, without which the official assignee had not a sufficient authority to make the deed revesting the property in the plaintiff.

January 15, 1878. The case was argued before Wilson, J., sitting for the full Court.

McCarthy, Q. C., for defendant. All property of the debtor up to the date of his discharge passes to the assignee. The second replication does not shew the circumstances which the statute requires to be shewn, before the assignee can re-assign the estate to the debtor. All those preliminary matters must be shewn to have been performed, because they are essential to give the discharge effect. The mere conveyance by the assignee cannot give the debtor such rights as are claimed here, when section 66 of the Insolvent

Act of 1875 declares that "in no case shall a discharge have any effect unless and until it is confirmed by the Court or Judge," which is a new enactment. He referred to the Insolvent Act of 1875, secs. 16, and 39, to 60, both inclusive, and sec. 66; *Commercial Union Ins. Co. v. Smith*, 33 U. C. R. 529; *Wadling v. Oliphant*, L. R. 1 Q. B. D. 145; *Nicholson v. Gunn*, 35 U. C. R. 1; *Dunn v. Irwin*, 25 C. P. 111.

H. S. Strathy, contra. The Act, it is true, vests all the property of the debtor in the assignee up to the time of his discharge. But if after the assignment by the debtor he is allowed by the assignee to deal upon his own account, such transactions are as valid between the insolvent and those with whom he deals as if there were no insolvency, and he may bring actions with respect to such dealings in his own name, and it is no defence that he is an insolvent, for so long as the assignee permits such insolvent so to deal and sue, and does not interfere in any manner with such proceedings, the insolvent may proceed and sue in that manner as if he were not an insolvent. The third replication is therefore sufficient: *Herbert v. Sayer*, 5 Q. B. 965. The second replication is based upon section 60 of the Act. That replication need not shew the creditors who executed the discharge had *proved* their debts, because sec. 2, sub-sec. *h*, declares a "creditor" shall mean one whose claim is \$100 or upwards which has been *proved*, and that section explains section 52, which is relied on to support that objection. Section 66 of the Act does not alter the meaning and effect of section 60. He referred to secs. 15, 39; *Ex parte Dewhurst*, L. R. 7 Ch. 185; *Rooney v. Lyon*, 40 U. C. R. 366, 2 App. 53; *Nicholson v. Gunn*, 35 U. C. R. 7.

McCarthy, Q. C., in reply. The deed of composition and discharge cannot be valid until confirmed, when the statute says it shall not be. The deed to the plaintiff by the assignee must therefore be invalid, because there has been no confirmation of the composition and discharge. Sections 16 and 39 shew the exclusive right to bring action is vested only in the assignee. The word *creditor*, as used

in the second replication, cannot be held to mean such a person as a creditor is defined to be in the sections referred to. He referred to *Wellington v. Chard*, 22 C. P. 518.

January 29, 1878. WILSON, J.—As to the second replication, the plaintiff claims title by deed of conveyance made of his estate to him by the assignee in insolvency, in conformity with the terms of a deed of composition and discharge.

It is not stated what the terms of the deed of composition and discharge were or are, and I can therefore know nothing of them. That was the form of replication in *Nicholson v. Gunn*, 35 U. C. R. 7

It seems, however, although not excepted to there, to be almost too compendious a mode of pleading. The Court should be informed of those facts which are relied upon as giving validity to the deed of conveyance, to be enabled to say whether the conveyance was duly executed in conformity with the terms of the deed of composition and discharge.

I shall pass that over at the present, because the pleading is according to the case already referred to, but that form of replication had better not be taken as a precedent, for it is a rule "that the party who pleads a contract, must set it out if he be a party to the contract": *Hill v. Montague*, 2 M. & S. 377.

It is not required that every precedent act and notice should be averred to have been precisely and regularly taken by the insolvent or by the assignee—a general averment of performance would be sufficient in that case, as in any other. But even that is wanting here if there are any conditions contained in it, which I presume there are.

The exceptions taken to it are, that it is not shewn the creditors who assented to the composition and discharge are creditors who proved their claims, and that the deed to the plaintiff is invalid without confirmation.

By the 60th section: "So soon as a deed of composition

and discharge shall have been executed as aforesaid, it shall be the duty of the assignee to re-convey the estate to the insolvent."

But by section 66, "In no case shall a discharge have any effect unless and until it is confirmed by the Court or Judge."

If the *discharge* there referred to means a discharge given by the requisite number and value of creditors, as well as the discharge granted by the Judge, that enactment must apply in this case.

Sections 49 to 63 inclusive, apply to a discharge, or to a composition and discharge given by creditors. Sections 64 and 65 apply to a discharge given by the Judge when the debtor has not obtained one from his creditors.

Then follows section 66. "Every discharge, or confirmation of any discharge obtained by fraud or fraudulent preference, or by means of the consent of any creditor, procured by the payment or promise of payment to such creditor of any valuable consideration for such consent, or by any fraudulent contrivance or practice whatever, tending to defeat the true intent and meaning of the provisions of this Act in that behalf, shall be null and void, and in no case shall a discharge have any effect unless and until it is confirmed by the Court or Judge."

The latter part of the section shews that the discharge which is granted by the Court or Judge must be confirmed, which seems unnecessary, because the Judge's discharge is put upon the same ground as the confirmation by him of a discharge given by creditors: Sec. 65.

It seems to be clear that the deed of composition and discharge in this case can have no effect unless and until it is confirmed. And that does not appear to have been done. The law has been altered in that respect since *Nicholson v. Gunn*, 35 U. C. R. 7, was decided.

It is the confirmation of the discharge which frees and discharges the debtor: Section 61.

The sixtieth section then, which provides that so soon as a deed of composition and discharge shall have been executed,

as aforesaid, it shall be the duty of the assignee to re-convey the estate to the insolvent, must be subordinated to sections 61 and 66, and certainly also to section 52, so that, if the conveyance to the debtor be made before the discharge has been confirmed, the deed of conveyance must be conditional in the meantime, dependent for its actual validity upon its being subsequently confirmed.

It is plain, if a conveyance to the debtor be made before his discharge has, or can have, any operation or effect, that the property professed to be given to him could be seized again by the assignee, because until the discharge—that is, the effectual discharge by confirmation—is given, the debtor can hold no property against his assignee: *Nias v. Adamson*, 3 B. & Ald. 225; *Hull v. Pickersgill*, 1 B. & B. 282.

In *Webb v. Ward*, 7 T. R. 296, Lord Kenyon said: “As to the certificate being signed, but not allowed, it operates as nothing.”

The second replication is defective for that cause.

The defendant further contends that it is insufficient, because it merely says the official assignee conveyed to the plaintiff in conformity with a deed of composition and discharge, duly executed by the requisite proportion in number and value of the plaintiff's creditors, in place of saying that these creditors had *proved* their claims, and that they represented three-fourths of such claims which had been proved.

Section 49 speaks of the composition and discharge being signed “by at least a majority in number of the creditors who have then respectively proved claims of \$100 and upwards.”

Section 52 repeats in substance the above language, and adds to the same the further words, “and who represent at least three-fourths in value of all the claims of \$100 and upwards which have been proved.”

Section 56 speaks of “the assent of the proportion of his creditors in number and value required by this Act.”

Section 60: “So soon as a deed of composition and discharge shall have been executed as aforesaid.”

The proper allegation to have made in the replication with respect to the proportion of the creditors who executed the deed of composition and discharge, would have been to have used the language of sections 49 and 52 just mentioned.

The plaintiff says it was unnecessary to do so, because the word *creditor* in the Act, by section 2, sub-sec. *h*, in reference to the execution of a deed of composition and discharge, is "a person * * whose unsecured claims to an amount of \$100 or upwards have been proved in the manner provided by this Act; and the proportion of claims in value required to give validity to any such preceeding or action, shall be formed of all claims so proved, whether above or under \$100, and of no others; and with regard to any deed of composition and discharge, or the consent to a discharge of the insolvent, no creditor, whose claim is not affected by such discharge, shall be reckoned as one of the required number of creditors, nor shall his claim be reckoned as forming part of the proportion of claims required to give effect to such composition and discharge."

It appears to me there is some contradiction between section 2, sub-section *h*, and sections 49 and 52. The first of these clauses after declaring what *creditor* shall mean—that is, a person whose unsecured claim to the amount of \$100 or upwards has been proved—proceeds: "and the proportion of claims in value required to give validity to any such proceeding or action" (including the execution of a deed of composition and discharge) "shall be formed of *all claims so proved whether above or under \$100*, and of no others;" while the other two sections speak of the claims being \$100 and upwards.

As the replication is held bad upon another ground, it is not of much consequence how this latter averment should be held.

It would be far better if the replication had followed the precise language of sections 49 and 52, and there could have been no doubt about the fact. I have had occasion more than once to notice this kind of statement which is contrary to the rules of pleading.

The facts should be set out so that the jury can try them if the case go the jury, and so that the Court may try them if an issue in law arise. Now a jury cannot know what the requisite number and value of the plaintiff's creditors are by the statute in such a case, because that is a matter of law, and they are not judges of law, but they could tell whether there was a majority of creditors who had proved their claims to \$100 or upwards, and who represented at least three-fourths in value of all the claims of \$100 and upwards which had been proved.

This manner of pleading is at times embarrassing, as in the present case, if there be, as it appears to me there is, a difference between the wording of the sections which I have referred to.

As to the third replication. It is by section 16 expressly provided that the assignment by the insolvent shall vest in the assignee all the property of the debtor which he is possessed of or entitled to at that time, and all such as he may become possessed of or entitled to up to the time of his obtaining his discharge. According to this replication the plaintiff has not yet been discharged.

It has long been decided that property acquired by the bankrupt after the commission issued against him may be sued for in his own name by reason of the special property which he has in it, which confers upon him a title good as against all the world but his own assignee: *Webb v. Fox*, 7 T. R. 391.

So if one convert goods of which the bankrupt has the right of property, but not the actual possession acquired since the date of the commission, he may sue in such case in like manner as if the possession had been vested in place of only the right of possession: *Fowler v. Down*, 1 B. & P. 44.

Heath, J., said in that case, that the bankrupt had a defeasible title which none but his assignees could defeat, and that he could hold such property until his assignees claimed it in like manner as an alien could hold land and bring actions in respect of it so long as the Crown did not claim it.

In *Evans v. Mann*, Cowp. 569, the bankrupt who sold goods after his bankruptcy, and before his certificate, was held entitled to recover the price of them until his assignee interfered, as he did in that case after the bankrupt had received part payment.

In *Hesse v. Stevenson*, 3 B. & P. 565, at p. 578, Lord Alvanley said, "But if he (the bankrupt) accumulate any large sum, it cannot be denied that the assignees are at liberty to demand it; though, until they do so, it does not lie in the mouth of strangers to defeat an action at his suit in respect of such property, by setting up his bankruptcy."

In *Drayton v. Dale*, 2 B. & C. 293, the action was by an indorsee against the maker of a note payable to one Clarke or order. Clarke got the note after his bankruptcy, but before his certificate, and endorsed it to the plaintiff. The maker set up Clarke's bankruptcy to defeat an endorsation to the plaintiff.

Abbott, C. J., at p. 298, said: "Now is it a just conclusion of law from the facts stated in the plea, that the right and title to endorse this note vested absolutely in the assignee? I am of opinion it is not. * * The assignees have vested in them a right to interfere and claim the property; and if they do make a claim it is effectual against the bankrupt and all the world; but if they do not interfere, then, as between the bankrupt (or one claiming under him) and his debtor, the latter cannot set up their title; but the bankrupt has the right in a Court of law to enforce the payment of his debt."

And that is the rule, although Lord Kenyon said in *Webb v. Ward*, 7 T. R. 296, "an uncertificated bankrupt cannot have any property of his own," meaning of course any *absolute* property. The application in that case was for security for costs by a bankrupt who was suing, and he was ordered to give security.

The case of *Herbert v. Sayer*, 5 Q. B., 965, determined that matter finally in the Exchequer Chamber.

Then 6 Geo. IV. ch. 16, sec. 63, vested in the assignees

not only the present but all the future estate of the debtor which he might acquire before he obtained his certificate. The particular case there was, whether a bankrupt twice certificated, and who had not paid fifteen shillings in the pound, had a right to after-acquired property.

Tindal, C. J., put such a case as that on the same footing as after-acquired property by a bankrupt who had not got his certificate. He said, on the main question, p. 975: "We are of opinion he has a good right, except as against the assignees; (That is, to bring an action on the bill.) and as the plea does not state they have interfered, it does not contain a complete defence. And to this conclusion we have come, as well upon the authorities, as upon the reason and convenience of the principle which they establish." And at p. 980 he said: "Such are the authorities in favour of the right of an uncertificated bankrupt against all but his assignees, and certainly this has been treated as a well known principle in this branch of law, perfectly well established for a long series of years."

In *Ex parte Dewhurst*, L. R. 7 Ch. 185, it was held that money received by an undischarged bankrupt, and paid away by him for value, could not be followed into the hands of the receiver of that money. *Wadling v. Oliphant*, L. R. 1 Q. B. D. 145, is a decision to the like effect. See also *Engelback v. Nixon*, L. R. 10 C. P. 645.

I hold the third replication to be good in law.

The third rejoinder to the second replication, which was also demurred to, is good. It set up the want of a confirmation of the deed of composition and discharge, and as I have decided that the second replication is bad, because it it does not shew the deed of composition and discharge had been confirmed, I must also hold that the rejoinder, setting up as a fact the want of confirmation, is a good pleading, and therefore the demurrer to it cannot be supported.

There will be judgment for the defendant for the in-

sufficiency of the second replication, and on the demurrer to the third rejoinder to that replication, and for the plaintiff on the demurrer to the third replication

Judgment accordingly.

IN THE MATTER OF THE ARBITRATION BETWEEN GEORGE COLLINS AND THE WATER COMMISSIONERS OF THE CITY OF OTTAWA.

35 Vic. ch. 80, sec. 4, O.—*Arbitration under—Compensation for land and privileges—Interest.*

By 35 Vic. ch. 80, sec. 4, O., the water commissioners of Ottawa, thereby incorporated, are authorized and empowered to enter into and upon any lands, and to survey, set out, and ascertain such parts thereof as they may require for the purpose of the water works, and also to divert and appropriate any spring or stream of water thereon; and to contract with the owners or occupiers of said lands, and those having an interest or right in the said water, for the purchase thereof, or of any part thereof, or of any privilege that may be required for the purpose of the commissioners; and in case of any disagreement between them and the owners or occupiers of such lands, or any persons having an interest in the said water, or the natural flow thereof, or any such privilege as aforesaid, respecting the amount of purchase of value thereof, or as to the damages such appropriation shall cause to them, or otherwise, the same shall be decided by three arbitrators, to be appointed as there provided. *Held*, that the words "such appropriation" applied to the taking of land as well as a diversion or appropriation of water, and that the arbitrators had power to give damages in all cases of appropriation where the value of the land taken would not be adequate compensation, as in this case.

Held, also, that they were authorized to award interest on the compensation money from the time when the commissioners entered upon and appropriated the land.

The award was also objected to as excessive, but was upheld, there being evidence to justify the amount awarded, and no ground for imputing partiality or legal misconduct to the arbitrators.

J. K. Kerr, Q. C., on the 24th of November last—upon reading the rule of Court making the orders of the Judge of the County Court of Carleton, dated 5th June, 1875, and

11th July, 1876, respectively, rules of this Court, and upon reading the award made by the arbitrators and the affidavits filed—obtained a rule calling on George Collins to shew cause why the award should not be set aside, on the grounds:

1. That the amount awarded to be paid by the said Water Commissioners to the said George Collins for the purchase or value of the land, right of way and privilege mentioned in the award, and for the damages in the said award mentioned, are excessive.

2. That the amount so awarded is beyond the value of the said land, right of way, and privilege, and that the said arbitrators had no power to award damages beyond the value of the said land, right of way, and privilege.

3. That even if the said arbitrators had power to award damages, the amount awarded is excessive.

4. That the arbitrators had no power to award interest upon the amount awarded to be paid for the value of the land, right of way, and privilege, and damages, or at all events had no power to award interest to be paid upon the amount awarded for damages.

5. That upon the evidence the said award is erroneous, and the said arbitrators have awarded a sum in excess of the amount warranted by the evidence.

6. That the arbitrators exceeded their powers.

The award moved against was made by two of the three arbitrators appointed under 35 Vic. ch. 80, sec. 4, O., incorporating the Ottawa Water Commissioners.

It recited the fourth section of the Act, and set forth that the Water Commissioners did require, set out, and ascertain, for the purposes of the said water works, the land following, to wit, being part of the original lot number forty, in the broken concession A, Ottawa front, in the township of Nepean, in the county of Carleton, and hereinafter mentioned, that is to say, that part of the westerly portion of lot number one, in block letter P, described as follows, that is to say: Commencing at the north-west corner of the said lot number one, in.

block P; thence south-easterly, along the division line between lots numbers two and one, a distance of fifty-one links; thence easterly, and parallel to the said northern boundary of the said lot number one in block P, a distance of fifty-one links; thence north-westerly, and parallel to the west boundary line of the said lot number one, in block P, a distance of fifty-one links, more or less, to the north boundary line of the said lot number one, block P; then westerly, along the north boundary line of lot number one, block P, a distance of fifty-one links, more or less, to the place of beginning—together also with any right of way leading from Cathcart street, or other rights and privileges which may heretofore have been appropriated by the said Commissioners, and formerly belonging to one George Collins: that the Water Commissioners did, by by-law dated 29th of October, 1872, appropriate the said land, rights, and privileges aforesaid, the same being required, and having been duly set out and ascertained by the said Commissioners, for the purposes of the said water works, and George Collins was and is owner of the said land: that the said George Collins was and is insane: that it was necessary the value of the said land and the damages the appropriation thereof caused the said George Collins should be decided under the said Act by three arbitrators appointed by the said Judge of the County Court of the County of Carleton; that the arbitrators so appointed were Martin O'Gara, Alexander Workman, and George Henry Preston; and the arbitrators before entering upon the reference were duly sworn, and that Martin O'Gara differed from the decision of the other two arbitrators.

The operative part of the award made by the majority of the arbitrators was as follows: "We do award, determine and adjudge, order and assess the sum of money which the said Water Commissioners for the City of Ottawa shall pay to the said George Collins, the person represented as entitled to receive the same, for the amount of purchase or value of the said land, right of way, and privileges above described and appropriated as aforesaid, and for the damages

such appropriation as aforesaid caused to him the said George Collins, and otherwise, at the sum of \$2000. And we do further order and determine that the said Water Commissioners do pay to the said George Collins interest at the rate of six per cent. per annum on the said sum of \$2000, calculated from 29th October, 1872, being the date of the by-law appropriating said land, right of way, and privileges, which said sum of \$2000 and interest in the whole amount to \$2580."

The lot in question belonging to Collins was 33 feet frontage and 140 feet in depth, and was situate on the side of a hill. There was access to the rear by a lane 9 feet wide from Cathcart street, to which Collins had the exclusive use. This lane was obstructed by the Water Commissioners, but in lieu of it they gave a right to use, in common with others, a lane eight feet wide, from Lloyd street. The part of the lot taken could be used for a garden. The middle part of the lot was of no value, being on a steep hill. The dwelling house was on the front or south end of the lot. There was no access to it except from the north. The Water Commissioners appeared to have appropriated the land about the time of the passing of the by-law, and more or less to have obstructed the lane from Cathcart street from the same time. The lane which the Water Commissioners gave in lieu was obstructed by some stone so as to be almost impassable.

The piece of land taken was thirty-three feet square across the rear of Collins's lot.

There were several witnesses examined before the arbitrators as to the value of the land and the privilege taken and the damages to the land not taken, about the time of the appropriation; and afterwards William Stewart valued the land taken from fifteen to twenty-five cents a square foot. Edward C. Barber, at one time a tenant of the house, valued the land taken at twenty-five cents a square foot, and the damages from forty to forty-five cents a square foot. Thomas Dowsley, a real estate agent, valued the land taken, with the use of a nine feet lane, at \$700.

He estimated the damages for the lane and the thirty-three feet square at \$700. This was irrespective of the substituted lane, which he considered useless. Ann E. Collins, the wife of the owner, claimed at least \$1,000, for damages, besides the value of the land taken \$1,000. William Cousins, the assessor, valued the lot and improvements, when the piece was taken, at from \$1,200 to \$1,600. He was of opinion that the piece taken was not worth more than \$400. This was without access by the lane. Allowing damages for procuring access in a different mode which he described, he thought \$600 sufficient. William Patterson, a real estate agent, valued the whole lot at \$4,000 and the piece taken at \$2,000. C. R. Cunningham, a real estate owner near by, and at one time secretary of the Water Commissioners, valued the whole of the Collins lot, without buildings, at \$600, and was of opinion that the substituted lane was better than the old lane. H. P. Hill, a neighbouring property owner, valued the piece of land taken at \$250, excluding from consideration the question of right of way. William Young, Rochester, valued the whole lot at \$4,000, but could not give any opinion as to the value of the piece of land taken. D. M. Grant, an assessor in 1872, valued the piece taken at \$200. Anthony Tamey swore that the substituted lane could be made passable for \$20. William Kennedy swore that for all practical purposes a lane eight feet wide is as useful as a lane nine feet wide.

The affidavits filed, on motion for the rule *nisi*, shewed that the value of the land appropriated and all damages to the remaining part of the lot, did not exceed \$800.

The affidavits in answer shewed the lot before the appropriation by the Water Commissioners to be worth \$4,000, and since the appropriation to be worth only \$2,000, and that the Commissioners had given \$1,500 for a piece of land of the same size immediately adjoining.

January 11, 1878. *Langton*, shewed cause. The award cannot be set aside merely on the ground that the arbitra-

tors formed an exaggerated estimate of the damages. That was the matter upon which their opinion was asked, and their opinion when given is final, unless so grossly wrong as to suggest moral misconduct. See *Lancaster v. Hemington*, 4 A. & E. 345; *Baggallay v. Borthwick*, 10 C. B. N. S. 61, 64; *Re Bradshaw and The East and West India Docks and Birmingham Junction R. W. Co.*, 12 Q. B. 562. The arbitrators did not exceed their powers in awarding damages for loss of the right of way. The terms of section 4 of 35 Vic. ch. 80, gave them authority to award compensation for the land taken, as well as damages for loss of any privileges taken. The privileges referred to are evidently not merely water privileges. Interest may be awarded, it is only part of the damages: *Rhys v. Dare Valley R. W. Co.*, L. R. 19 Eq. 93; and even if interest was wrongly awarded, that portion of the award is separable from the remainder, and the whole award should not be set aside: *Jones v. Reid*, 1 P. R. 247; *Roddy v. Lester*, 14 U. C. R. 259; *Faulkner v. Saulter*, 1 P. R. 48.

J. K. Kerr, Q. C., contra. The evidence shews the amount awarded is excessive, and the arbitrators had no right to award damages for obstructing the right of way. The Act only contemplates damages being awarded for diverting streams: 35 Vic. ch. 80, sec. 4, O. This differs from arbitrations under the Railway Act, where express power is given to award damages. The arbitrators had no power to award for interest, and, at all events, no right to award interest from the date of the by-law, for the land might never have been taken. He cited *Rhys v. Dare Valley R. W. Co.*, L. R. 19 Eq. 93; *Regina v. The Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 208; *Widder v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222, 520, 27 U. C. R. 425.

January 15, 1878. HARRISON, C. J.—This application is made under 35 Vic., ch. 80, sec. 4, O.

The motion is to set aside the award substantially on two grounds.

1. That the arbitrators have exceeded their powers.

2. That if there be no excess of power there is such a wrongful exercise of it as to amount to legal misconduct on the part of the arbitrators.

An award is the decision of one or more persons having a limited and no other authority to determine the matters submitted by the parties, or, as in the present case, by a statute.

If that limited authority has not been pursued, and the arbitrators have awarded something beyond the authority, the award is *pro tanto* void, and if the void parts be mixed up with the rest so that it cannot be excised, the award is altogether void.

If this were not so in such a case, those against whom the award is made, would be compelled to fulfil the void as well as the good part.

When the void part is on the face of the award severable from the good part of the award, the former only may be set aside: *Faulkner v. Saulter*, 1 P. R. 48; *Jones v. Reid*, *Ib.* 247; *Roddy v. Lester*, 14 U. C. R. 259; *Re Northumberland and Cobourg*, 20 U. C. R. 283.

These are the principles in substance, if not in words, expressed by Mr. Justice Blackburn, at p. 229, of *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 Ex. 221.

Notwithstanding the subsequent reversal of that case in L. R. 5 H. L. C. 418, on a different point, the case contains an accurate expression of the practice as to setting aside awards.

Now, as to the alleged excess of authority.

An interference with the enjoyment of property belonging to another *prima facie* gives a right of action. See *Clowes v. Staffordshire Potteries Water Works Co.*, L. R. 8 Ch. 125. But social duties and obligations are generally made paramount to individual rights and interests to this extent, that power is often given to the public, upon compensation, to appropriate private property for public uses. See *Divisional Council of Cape Division and De Villiers*, L. R. 2 App. Cas. 567. See further *Re Burritt and The Corporation of Marlborough*, 29 U. C. R. 119, 131.

Legislation which authorizes the doing of public works or *quasi* public works makes their doing lawful, and so takes away the right of action which would have otherwise arisen : *Dungey v. The Mayor of London*, 38 L. J. C. P. 298, 17 W. R. 1106 ; *Cracknell v. Mayor of Thetford*, L. R. 4 C. P. 629 ; *Geddes v. The Banks Reservoir Co.*, L. R. 11 Ir. C. L. 160 ; *Jones v. The Stanstead, Shefford, and Shanby R. W. Co.*, L. R. 5 P. C. 98.

Although the statute in effect takes away the action, compensation is only allowed when provided by the statute and in the manner prescribed by the statute : *Mayor of Montreal v. Drummond*, L. R. 1 App. Cas. 384, 410.

Compensation is generally provided in respect of all acts by which lands are "injuriously affected." These words have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable if the work causing it had been executed without statutable authority : *Brand et ux. v. The Hammersmith and City R. W. Co.*, L. R. 4 H. L. 171 ; *City of Glasgow Union R. W. Co.* L. R. 2 Sc. App. 78 ; but are generally construed as giving compensation for whatever damage would be otherwise recoverable by action : *Ib.*

If the statute providing for the interference with private property and for the payment of compensation be so equivocal in its language that it may be read either as giving full compensation or only partial compensation, it is only right to read it as giving full compensation—that is, such compensation as would, but for the statute, be recoverable in an action for damages.

On the other hand, where the language of the statute is free from doubt, and admits only of partial compensation, the Court would have no power, under such language, to sanction an award of more than the compensation provided for by the statute : See *Cummins v. The Credit Valley R. W. Co.*, 21 Grant 162.

Statutes giving compensation to owners of land appropriated for some public or *quasi* public purpose are no uniform in their language.

The sixty-eighth section of the English Land Clauses Act of 1845 is one under which there are many decisions, and it provides for compensation not only for lands taken but for lands "injuriously affected." *Lloyd on Compensation*, 3rd ed., 82

These two classes of damage are perfectly distinct, and in the case of a particular landowner may co-exist and be properly the several subjects of compensation. See *Re Bradshaw and The East and West India Docks and Birmingham Junction R. W. Co.*, 12 Q.B. 562.

The two classes of damage, under the English Land Clauses Act, are much discussed in *Buccleuch v. Metropolitan Board of Works*, L. R. 5 Ex. 221, and L. R. 5 H. L. 418.

The provisions of our Consol. Stat. C. ch. 66, as to payment of compensation by railway companies, will be found, in the main, identical in language with the clauses of the English Land Clauses Act. This is pointed out in *Regina v. The Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 208.

Similar language is used in section 456 of the present Ontario Municipal Act : Rev. Stat. O. ch. 174 sec. 456.

It remains to be seen whether the Act under which the arbitration here took place, in effect corresponds with or essentially differs from the foregoing enactments.

The 35 Vic. ch. 80, O., instead of, as in general terms, incorporating the provisions of Consol. Stat. C. ch. 66, makes special provision on the subject of compensation.

This special provision is wholly contained in section four of the Act, and to the language of that section particular attention must now be directed.

It authorizes the Water Commissioners from time to time "to enter into and upon the lands of any person in the city of Ottawa, or within five miles of the city," and "to survey, set out, and ascertain such parts thereof" as they may require for the purposes of the Water Works.

The acquirement of land under such a power is in effect, although not in words so described, an appropri-

tion of the land acquired to the use of the Water Works Commissioners.

The section then proceeds to empower the Commissioners "to divert and appropriate any spring or stream of water thereon" as they shall judge suitable and proper.

So far provision is made for interference with only two kinds of property, and these are the taking and appropriation of land and the diversion or appropriation of water, or any part thereof; and it is necessary to bear them in mind when examining the language used in the subsequent part of the section, which is an unusually long one.

The power of the Commissioners is to contract with the owners or occupiers of "the said lands," *and* those having an interest or right "in the said water," for the purchase thereof, or of any part thereof, *or of any privilege that may be required for the purpose of the said Water Works Commissioners.*

The latter words, it will be observed, go beyond the powers first quoted, and appear to be additional thereto. The privilege last mentioned is not of necessity a water privilege. It may, I think, be any other privilege, such as an easement over a road, &c.

Provision so far, in this view, is made for the interference with at least three classes of private property.

These are the taking or appropriation of land, the diversion or appropriation of water, *and* the acquirement of *any* privilege that may be required for the purposes of the Commission.

In the case of disagreement between the commissioners "and the owners or occupiers of *such* lands, or any person having an interest in the *said* water, or the natural flow thereof, or any *such* privilege as aforesaid," respecting the amount of purchase or value thereof, or as to the damages *such appropriation* shall cause to them, *or otherwise*, provision is made for arbitration.

What is the meaning of the words *such appropriation* as used in this part of the section? Do they mean the appropriation of land effected by entering upon, surveying

and setting out the same, as well as a diversion or appropriation of water, or do they mean *only* the latter? If the latter, the award, which gives damages in addition to the value of the land and privilege appropriated, cannot be sustained.

The latter interpretation would not only be so narrow as in some cases to leave the arbitrators without the power of awarding adequate compensation, but would ignore entirely the use of the words "or otherwise."

The insertion of these words evinces an intention to broaden the meaning of the word "appropriation" and to extend the right to give damages in all cases of appropriation where the mere value of the land taken would not be adequate compensation.

It is the duty of the Court, when construing an Act of Parliament, if possible, to give effect to every word which the Legislature has used.

It is also the duty of the Court, if possible, consistently with the language used, to prevent an Act authorizing interference with private property operating unjustly in the case of any of the property owners affected by its operation.

Where the land taken is the front or the rear of a lot of land, and has the effect of excluding the owner of land from access to a public highway either by land or water, it is obvious that the enjoyment of the land not taken must be thereby diminished and its value thereby depreciated: See *Regina v. The Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 208; *Widder v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520, 27 U. C. R. 425; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 7 H. L. 243.

Payment of the value of the land taken in such a case, without more, would be no adequate compensation for the damage done to the owner of the land.

It cannot be held that the Legislature by the 35 Vic. ch. 80, meant to do such an injustice; and as there is language used which is capable of a different construction

it must be held that the Legislature designed by the language used to provide compensation for all the damage done to a property owner whose property is prejudicially affected by the exercise of the powers conferred: *Re Great Western R. Co. and Chauvin*, 1 P. R. 288; *Great Western R. Co. v. Warner*, 19 Grant 506.

The award is in the very language of the Act, and is, in my opinion, subject to what I intend to say as to the interest, sustainable as against the objection of excess of authority on the part of the arbitrators.

The evidence appears to me to shew that the land taken or interfered with was entered upon and made use of by the commissioners long before the appointment of the arbitrators, and as long since as October, 1872.

From the time the commissioners are proved to have exercised their statutory powers, and entered upon the land of another, they became, in the eye of a Court of equity, owners of the land and chargeable with interest on the compensation payable therefor, till paid. See *Vanzant v. Burke*, 38 U. C. R. 104.

If this were not so held, it would be in the power of the commissioners to enter upon land for the purposes of the Act, and by resorting to litigation to postpone, by legal or other means, the settlement of the amount payable for compensation, while they all the time remained in possession of the land.

Such is the ruling, and such are the reasons given for it, in a similar case, in *Rhys v. Dare Valley R. W. Co.*, L. R. 19, Eq. 93, 23 W. R. 231.

It seems to me therefore that the award is also good as against the objection that it awards interest on the amount awarded as compensation to the land owner from the time when there is evidence that the Commissioners made the appropriations for which the compensation is awarded.

Then as to the excessive damages. It is not for the Court but for the arbitrators to decide as to the amount of compensation. If there be evidence to justify the amount awarded, it does not appear to me, in the absence of legal

misconduct on the part of the arbitrators, that the award should be set aside. Where the amount awarded, compared with the evidence, is so outrageous as to compel the imputation of legal misconduct, the award may be set aside. See *Commissioners of Public Works v. Daly et al.* 6 U. C. R. 33, 48; *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106, 118; *Re Canada Southern R. W. Co. and Norvall*, 41 U. C. R. 195.

But the mere fact that I, upon reading the evidence, would have awarded less is not any ground for setting aside such an award. I know nothing of the bias which particular witnesses may have shewn when giving their testimony. The arbitrators had this knowledge. Influenced by it, they may have discredited witnesses that I would be inclined to believe. They had a right to do so. In favour of their award I must infer that they did do so. They were not arbitrators appointed by the parties. They were all appointed by the County Judge. They are all, I believe, well known and respected citizens of Ottawa. If not competent men, I must assume the County Judge would not have appointed them. The decision of the majority, under the Act, is a valid award. I see no ground for imputing partiality to the two who made the award. If I were to reverse their decision on a mere question of the weight of evidence I would be placing myself in their position, without the advantage which they had of seeing the witnesses. Unless able to say, and to say without doubt, that there was partiality or other legal misconduct on the part of the arbitrators, it would be an usurpation of power for me to set aside the award. When called upon to decide as to the powers of others, I must not be regardless of my own.

The rule must be discharged, with costs.

Rule discharged.

HILARY TERM, 41 VICTORIA, 1878.

(From February 4th to February 23rd).

Present :

THE HON. ROBERT ALEXANDER HARRISON, C.J.

“ “ ADAM WILSON, J.

“ “ JOHN DOUGLAS ARMOUR, J.

REGINA V. GEORGE ARCHIBALD AMER AND LABAN AMER.

*Provisional District of Algoma—Commission of Oyer and Terminer to
District Judge—Power to issue.*

Held, that the Crown, by prerogative right, could issue a commission to the Judge of the Provisional Judicial District of Algoma to hold a Court of Oyer and Terminer, and General Gaol Delivery, for trial of felonies, &c.

Semble, per WILSON, J., that such Judge having by sec. 94 of C. S. U. C. ch. 128, the same powers and duties as a County Judge in Upper Canada, he might have been appointed under C. S. U. C. ch. 11, sec. 2, to act as commissioner.

Semble, also, that the Lieutenant-Governor of Ontario, as well as the Governor-General, has the power to issue commissions to hold Courts of Assize.

CRIMINAL CASE stated under Consol. Stat. U. C. ch. 112.

The prisoners were tried at a special Court of Oyer and Terminer and General Gaol Delivery in and for the provisional district of Algoma, on the 2nd October, 1877, at Sault St. Marie, in the provisional district of Algoma, before the Hon. Walter McCrea, Judge of the provisional judicial district, for murder, on two several indictments, The one was for the murder of William Bryan, the other for the murder of Charles Bryan.

On the first of these indictments George Archibald Amer was found guilty of manslaughter, and Laban Amer was found not guilty.

On the second of these indictments the two prisoners were found guilty of murder.

The counsel for the prisoners objected to the passing of judgment upon them,—1. Because neither the authorities of the Dominion, nor of the Province of Ontario, had power to issue a commission to the said Walter McCrea as a Judge of a Court of Oyer and Terminer and General Gaol Delivery under Consol. Stat. U. C., ch. 11, as he was not one of the several classes of persons named in section two of that statute, because Consol. Stat. U. C., ch. 128, sec. 94, respecting unorganized tracts, gave him the same power and jurisdiction as County Court Judges have, but for the purposes of such Courts only, and did not render him eligible for any appointment beyond that as Judge of the said District Court.

2. That the authorities of Ontario had no power to appoint a Judge, and the commission which was issued by them was void; and the authorities of the Dominion had no power to constitute a Court except by Act of Parliament, and there was no such Act constituting the Court, and their commission was also void.

The learned Judge held the Court under two commissions, one issued by the Lieutenant-Governor, of Ontario, dated 11th September, 1877, and the other by the Deputy-Governor of the Dominion, dated 22nd September, 1877. The commissions were addressed by name to the several Chief Justices and Judges of the Queen's Bench and Common Pleas and to] "the Honourable Walter McCrea, Judge of the provisional district of Algoma, in the Province of Ontario."

The commissions followed in form that given in 4 *Chitty's Criminal Law*, 2nd ed., 134, and authorized the holding of a Court of Oyer and Terminer and General Gaol Delivery.

During Michaelmas term, December 1, 1877, *Hardy*, Q.C., for the Crown. The Consol. Stat. U. C., ch. 11, sec. 6, authorizes special commissions of Oyer and Terminer, or of Gaol Delivery, for the trial of offenders whenever deemed expedient. Chapter 128, sec. 93, of the Consol. Stat. U. C., authorizes the Governor during the continuance of any provisional judicial district, to issue the necessary commissions authorizing the holding therein of such Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery; and section two of the first of these Acts does not restrain the generality of the other sections which are referred to. Besides, if ch. 11 relates only to counties, ch. 128 relates expressly to such a place as Algoma, and by it a commission may be issued, as before mentioned, and it need not be directed to any particular class of persons. It is also said that Mr. McCrea is not a *County* Court Judge, so as to be within ch. 11, sec. 2. He is a provisional judicial District Judge, "with the powers, duties, and emoluments of a County Judge in Upper Canada." But that does not shew that the commission might not lawfully be directed to him: *Regina v. Sullivan*, 15 U. C. R. 198. [HARRISON, C. J.—There is also the case of *Van Slyke v. Trempealeau County Farmers' Mutual Fire Ins. Co.*, 20 Am. 50.] It was said Mr. McCrea's judicial power was restricted to proceedings in the Courts of Quarter Sessions of the Peace, in the Courts of his judicial district, corresponding with the County Courts in counties, and in Division Courts, and that the judicial district was to be deemed and held to be a county for these purposes: Sec. 96. That argument does not touch the question. It is not correct to say that either commission has created a Court. The Court was and is in effect created by section 93, already referred to, and the commission has merely appointed the time and place and persons for holding the Court. The following commissions have at different times issued to that district:—May 27, 1865, to John Prince, who was then Judge of the said district, and who had been a Queen's Counsel before that, and was so then. October 15, 1869, to the same person.

December 22, 1871, to Mr. McCrea, then the Judge of the said district. He had never been a Queen's Counsel. April 30, 1875, to the same person. If the power of issuing such commissions existed, and was exercised before Confederation, there is nothing which has taken away such power. The power must rest then either with the Dominion or with the Provincial authorities. There can be no objection raised here, because a commission has issued from each of such authorities: *Chitty's Prerogative*, 77; 1 *Chitty's Crim. Law*, 2nd ed., 142, *et seq.*; 4 *Bl. Com.*, 3rd ed., 310; 2 *Hale's*, P. C. 29, *et seq.*; *Hawkins*, P. C., book ii. ch. 5; 4 *Inst.* ch. 28. The commissions in such cases may issue by prerogative: *Chitty's Prerogative*, 34; *Forsyth's Constitutional Law*, 167, *et seq.*; The Governor-General's Instructions, Sess. papers of 1867-8, No. 22, Article 3. As to the construction of the statutes, he referred to *Dwarris on Statutes*, 2nd ed., 504, 523, 532, 604; *Hawkins*, P. C., 8th ed., book ii., ch. 25, p. 290, note (2); *Attorney-General v. Newman*, 1 Price 438.

M. C. Cameron, Q. C., contra. There is a distinction between general and special commissions. The latter are for special times or special purposes. Although *Consol. Stat. U. C.* ch. 11, sec. 2, says that the commissions *may* also contain the names of County Court Judges and Queen's Counsel, besides those of the Judges of the Superior Courts of common law, yet from the general terms of the enactment it is restrictive, and the commission can be directed only to such persons. As ch. 128, sec. 93, names no person to whom the commission is to be directed, it must therefore be directed to such persons who by law ~~may~~ be appointed to perform such duties. By section 94 the Judge of the District is not made a Judge of a County Court although he has the powers of such a Judge, and he is not within the terms of section 97. In England the Judge or Sergeant presiding must be one of the quorum: 4 *Bl. Com.*, 3rd ed., 310; *Hawkins* P. C., book ii., ch. 1; *Harris's Crim. Law*, 290. By the Confederation Act Provinces create the Courts and the Dominion appoint

the Judges : secs. 12, 65 ; sec. 91, sub-sec. 27 ; sec. 92, sub-sec. 14. If such a commission could not issue before confederation, it cannot issue now. [HARRISON, C. J., referred to the *Marshalsea Case*, 10 Co. 68, b.] Mr. McCrea not being within the terms of ch. 11, sec. 2, had no authority to act as Judge on the trial.

February 4, 1878. WILSON, J.—The authorities shew that the Crown has by prerogative the right to establish Courts for the administration of justice according to the general law of the land, and may issue special commissions for doing justice according to law : *Chitty's Prerog.* 77 ; 4 *Bl. Com.* 17th ed. 310 ; 1 *Chitty's Crim. Law*, 2nd ed. 151.

It appears also to be quite settled that the Governor of a colony may by commission conferring upon him the authority to create a Court and to establish Judges, do these acts under that authority : *Forsyth's Opinions on Constitutional Law*, 167 to 174.

I conceive the prerogative of the Crown to constitute a new Court, or to issue a commission to such duly constituted persons as the Governor (if his commission extend that far) to take and hold any criminal Court such as is now in question, has not been superseded by any legislative authority which has been granted to us.

In the commission which was granted to Lord Monck as Governor-General, as referred to by Mr. Hardy, there is express power conferred to exercise authority in cases requisite as to the appointment of commissioners of Oyer and Terminer, and other necessary officers and ministers for the better administration of justice and putting the law into execution.

The jurisdiction of the Superior Courts of law in England to issue a writ of *habeas corpus* to this country, was held not to have been taken away by the creation of an independent Legislature in Canada : *Ex parte Anderson*, 3 E. & E. 487.

It was said in *Regina v. Bertrand*, L. R. 1 P. C. 520, 530 : "It seems undeniable that in all cases, criminal as

well as civil, arising in places from which an appeal would lie, and where, either by the terms of a charter or statute, the authority has not been parted with, it is the inherent prerogative right, and on all proper occasions the duty of the Queen in Council to exercise an appellate jurisdiction with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally."

These cases shew the power and right of the Crown in such cases.

These commissions now before us are general in their terms. They are not confined to the trial of any particular persons, or of any particular crimes, but are expressed in the language of the ordinary commissions which are issued at the appointed times for holding such Courts.

It appears commissions do not go to this judicial district at the usual stated times at which they go to the organized parts of the country.

These commissions were issued for the holding of the Courts between Trinity and Michaelmas terms in the same period in which the ordinary Courts of that nature throughout the other parts of the Province are held.

Are these then general or special commissions?

In 4 *Bl. Com.*, 17th ed., 311, it is said: "Sometimes, also, upon urgent occasions, the Crown issues a special or extraordinary commission of Oyer and Terminer and Gaol Delivery, confined to those offences which stand in need of immediate inquiry and punishment: upon which the course of proceeding is much the same as upon general and ordinary commissions."

In *Chitty's Prerog.*, 77, it is said: "So the King may issue special commissions for doing justice according to law, in extraordinary cases requiring speedy remedy and animadversion; though in ordinary cases commissioners of Oyer and Terminer can be granted only to the justices of either bench or to the justices in Eyre," referring to 13 Edw. I., St. 1., ch. 29, 30; 1 Wood. 97. Lord Coke says: "Commissions of Oyer and Terminer are of three sorts:—One

general at the suit of the King, as to hear and determine all manner of treasons, felonies, riots, routs, trespasses," &c. "Another particular, at the suit of the party, and that in two sorts, one naming particularly the party grieved. * * *Ex gravi querelâ D. accepimus* * * and the other is more general and of this form: * * *Ex clamosis querimonis diversorum hominum.* * * The third is as well at the suit of the King as of the party, all in one writ or commission": 2 Inst. 419. See also *F. N. B.* 110, *et seq.*

Again in 4 *Inst.* 162, it is said: "Of commissions of Oyer and Terminer there be two sorts, one general, so called because it is general in respect of the persons, the offences, and the places where the offences are committed."

And at p. 163, "Particular commissions of Oyer and Terminer, so called in respect of the persons, of the offences, or of the places, whereof you shall find five precedents in the register."

The register referred to is *F. N. B.* 110, *et seq.*, before mentioned.

In 1 *Chitty's Crim. Law*, 2nd ed., 150, it is said: "Sometimes, also, upon urgent occasions, the King issues a special or extraordinary commission of Oyer and Terminer and Gaol Delivery, confined to those offences which stand in need of immediate enquiry and punishment, and not founded upon any particular Act of Parliament, but on the general prerogative of the King to grant them." See also *Hawk.* book ii., ch. 5, secs. 24 to 32, inclusive.

According to these opinions, and leaving out of consideration at present the place in which the commissions were to be executed, the commissions are general and not special. They have not been issued upon any special urgency, or for any extraordinary case requiring speedy animadversion.

In England the practice seems to be as follows:—

In 4 *Blackstone's Com.*, 17th ed., 270, it is said the commission of Oyer and Terminer "is directed to the Judges and to several others, or any two of them; but the Judges, Queen's Counsel, and barristers, having patents of precedence, or Sergeants at law only are of the quorum, so that the rest cannot act without the presence of one of them."

In *Chitty's Prerogative*, 77, it is said: "Though in ordinary cases, commissioners of Oyer and Terminer can be granted only to the justices of either Bench, or to the justices in Eyre."

In 2 *Chitty's Crim. Law*, 143, it is said: "The commission of Oyer and Terminer is under the great seal directed to the Chancellor, President of the Council, Lord President of the Council, Lord Privy Seal, several Noblemen, two Judges of the Courts at Westminster, King's Counsel, Sergeants, and Associates; but the Judges, Sergeants-at-law, and King's Counsel therein mentioned are to be of the quorum, so that the rest cannot act without the presence of one of them."

In p. 145 it is said: "The commission of general gaol delivery is directed only to the Judges themselves, the Sergeants, the King's Counsel, and the Clerks of Assize, and Associate."

It is said in *Com. Dig. Justices*, G. 2, the justices of Oyer and Terminer shall be justices of the one bench or the other, or justices errant by 2 Edw. III. ch. 2; and in H. it is said by the 4 Edw. III. ch. 2, good and discreet persons shall be assigned to deliver gaols thrice a year or oftener, if need be.

In 2 Westm., ch. 29, it is enacted that "a writ of trespass (*ad audiendum et terminandum*) from henceforth shall not be granted before any justices, except justices of either bench, and justices in Eyre, unless it be for an heinous trespass, where it is necessary to provide speedy remedy, and our Lord the King, of his special grace, hath thought it good to be granted": 2 Inst. 418.

"Transgression here is taken in a large sense for any outrage or misdemeanor": p. 419.

The 2 Edw. III. ch. 2, provides "that the Oyers and Terminers shall not be granted, but before justices of the one bench or the other, or the justices errants, and that for great hurt or horrible trespasses, and of the King's special grace, after the form of the statute thereof ordained in time of the said grandfather and none otherwise."

Hawkins, Book ii. ch. 5, sec. 37, contends that neither 2 Westm. ch. 29, nor the 2 Edw. III. ch. 2, refers to general commissions, but only "to special commissions of Oyer and Terminer, granted at the complaint of particular persons, upon some great injury suggested to have been done to them," because these Acts, and the 34 Edw. III. ch. 1, to which he refers, speak of *writs* and not of commissions of Oyer and Terminer, and the term writs applies more properly "for redressing of a particular grievance at the suit of the party," and "because there may be a mischief to the subject from such special commissions which cannot be feared from general ones; for the party who sues out such a special commission, may thereupon take out a writ to the sheriff, commanding him to arrest the goods supposed to be wrongfully taken away, and to keep them in safe custody till some order be made concerning them by the justices assigned to determine the matter, which may be very inconvenient to the person complained of. Neither can it be imagined that the statute intended to restrain general commissions to enormous trespasses, which could not but hinder the due execution of justice, which requires the punishment of all kinds of misdemeanors. But it is reasonable, indeed, that such special commissions should not be granted but upon urgent occasions; and accordingly we find precedents for the superseding of them, where the king has been informed that he was imposed upon in granting them on a suggestion that the injury complained of was of a heinous nature, when in truth it was but a slight, inconsiderable trespass."

The argument of *Hawkins* is, that these statutes relate only to *special* commissions "granted at the complaint of particular persons upon some great injury suggested to have been done to them," and not to general commissions, nor to what are now called special commissions, issued at the instance of the Crown on an extraordinary or very urgent occasion.

It appears to me that the reasoning referred to is very strong to support the argument maintained, and that the

object and purport of the statutes tend greatly to confirm the opinion which *Hawkins* has expressed.

But while the later writers state the law to be different, I would not feel it safe in a capital case to vary from the law and practice so adopted, if the English law were to govern in this case.

But we have to consider here our own legislation on the subject, and especially Consol. Stat. U. C. ch. 128, relating to the unorganized tracts of the Province.

That statute, as already mentioned, provides expressly for the issue of such commissions into provisional judicial districts, but it is not said to whom they shall be directed.

The Act provides a special system of administration of justice in such a district. These are to be "temporary judicial districts," and afterwards, if necessary, "provisional judicial districts," into which, as a matter *ex abundanti*, it is provided the Queen's writs shall run from the Courts of law and equity of Ontario: Sec. 88.

The fact that the persons to whom such commissions shall be directed in such unorganized districts are not named or limited, is an argument that the general prerogative was not to be interfered with in issuing such commissions.

It may well be that it was necessary to provide a "speedy remedy" according to the 2 Westm. ch. 29, or for "the place," 4 Inst. 63, by the issue of these commissions, and it may well be argued that the unorganized tract with a special provisional judicial district only, is a place where it was necessary for the due administration of justice that a special commission should issue in the general form to such person or persons as Her Majesty thought fit to appoint for the occasion.

I am of opinion the Crown could issue a commission of the kind to this provisional judicial district by prerogative right and power to the persons therein named, and could constitute Mr. McCrea, the Judge of the district, one of the quorum, or I should rather say, as all who are named are of the quorum, one of the number who, equally with the others, might hold such Courts.

But independently of the prerogative right, I am very much inclined to think that Mr. McCrea, as the Judge of the provisional district, having by sec. 94 of ch. 128, "the same powers and duties as a County Judge in Upper Canada," might have been appointed under ch. 11. sec. 2, in like manner as a County Judge, to act as commissioner.

He is not a *County Judge*, but a *District Judge*: Sec. 97. He possesses the like powers which a County Judge does. He holds a County Court, presides at the Sessions of the Peace, and holds Division Courts, and may exercise all powers under the Insolvent law which a County Judge can do. He is in effect a County Judge in all but name. And therefore it is, I think, having "the same powers and duties as a County Judge, he may even under ch. 11 be nominated to hold the Courts under the commissions in question in like manner as a County Judge might be nominated.

There is another view of the case to be considered. These commissions consist of two parts: Firstly, of that part relating to the holding of a Court of Oyer and Terminer; and secondly, of that part relating to the holding of a Court of General Gaol Delivery.

In *Com. Dig.*, Justices, H. 2, it is said that by 4 Edw. III., ch. 2, "discreet persons" are to hold the Court of General Gaol Delivery.

I am not aware of any other legislation on that subject before the creation of our own constitutional powers.

But for the enactments of the Legislature restraining the exercise of the power of the Crown in such cases, Her Majesty might appoint by such commissions any one "to whom she will at her pleasure": 2 Inst. 420.

It is also well settled that the same persons having the different commissions of Oyer and Terminer, and of General Gaol Delivery, and of the Peace, may proceed by any one of them where they have no jurisdiction by another: 1 *Chitty's Crim. Law*, 142; 2 *Hale's P. C.* 34; *Hawkins*, book ii., ch. 5, sec. 21.

If Mr. McCrea could not act under the commission of Oyer and Terminer, I see no reason why he might not act under the other part of the commission relating to the gaol delivery.

I may therefore say that the commissions are, I think, valid under Consol. Stat. U. C. ch. 128, by the prerogative right and power of the Crown to issue them in the course of the due administration of justice in that provisional judicial district.

I think also they are valid under Consol. Stat. U. C. ch. 11, as rightly directed to Mr. McCrea as one of the commissioners, because he is in effect in all but name a County Judge, and he has "the same powers and duties as a County Judge."

I do not say because the Judge of the said district has the same powers and duties as a Judge of the County Court, that he is a County Judge, or that it would be proper to describe him as one.

The meaning of it is, that he may exercise these powers and duties by his own title and designation of such District Judge.

Although justices of the peace have a clause in their commission *ad audiendum et terminandum* felonies, &c., yet they come not under the name of justices of Oyer and Terminer within those Acts of Parliament that mention justices of Oyer and Terminer: 2 *Hale's*, P. C. 23.

Because there was a commission of Oyer and Terminer known distinctly by that name, and the commission of the peace known distinctly by another name: 9 Co. 118 b.; 3 Inst. 103; and because that designation applies to those who have general commissions, and not to them who have but a special commission only as justices of the peace have: *Wilson's Case*, Cro. Eliz. 601.

I think it cannot be said that either commission established Courts of Oyer and Terminer, and General Gaol Delivery. These Courts were already established in and throughout the Province, and all that these commissions have done was, to nominate persons to take and hold such Courts.

If that be so, and I think there is no doubt of it, the commission issued at Ottawa was not an excess of power, even if it created a Judge or Judges, for the Governor-General does possess such a power.

There has manifestly been a fear of there being an imperfect exercise of power by the issue of a commission from only one of the two powers, and therefore it is that the Ottawa as well as the Ontario authority has each issued a commission.

The Legislature of Ontario, by the British North America Act of 1867, sec. 92, sub-sec. 14, has the exclusive power to make laws in relation to "the administration of justice in the Province, including the constitution, maintenance, and organization of provincial Courts, both of civil and criminal jurisdiction." But there has been no legislation by Ontario declaring that the Lieutenant-Governor may issue commissions for holding Courts of Assize, &c.

By section 65 of the same Act, however, the power and authority to issue such commissions were vested in and exercisable by the Lieutenant-Governor of Upper Canada before the legislative union of Upper and Lower Canada, and were vested in and exercisable by the Governor-General after that legislative union up to the time of the Dominion Act taking effect, and such power and authority were at the taking effect of the last named Act capable of being exercised after that Act in relation to the Government of Ontario, and therefore they vested in and were to be exercised by the Lieutenant-Governor of Ontario after the taking effect of that Act.

It would seem, therefore, there can be little doubt that the Lieutenant-Governor of Ontario has the power and authority to issue commissions to hold Courts of Assize, &c.

That which probably raises a doubt of such power being vested in the Lieutenant-Governor is, that section 12 of the Act is worded in almost the same manner, with respect to the powers and authorities of the Governor-General, as section 65 is worded with respect to the power and authorities of the Lieutenant-Governor.

It would appear therefore that they can each issue commissions of this nature.

Section 96 of the Act, which empowers the Governor-General to appoint the Judges of the Superior, District, and County Courts in each Province, does not apply in terms to commissioners who are to Act as Judges of the Courts of Assize, &c. So that his power to appoint such persons must be exercised under section 12, above mentioned.

I agree therefore in the way in which the questions have been answered by the Chief Justice.

HARRISON, C. J.—Although under our system of Government the Monarch has long since ceased personally to act as a Judge, the administration of criminal justice still, to a great extent, pertains to the prerogative of the Crown.

The Monarch may, by virtue of this prerogative, except so far as restrained by Act of Parliament, constitute what number of Courts and in what places she pleases: *Chalmer's Opinions*, 195, 484, 542, 544.

The issue of commissions of Oyer and Terminer and General Gaol Delivery, both general and special, still proceed from the Crown, subject only to such restraint as the Legislature may have imposed on the exercise of the prerogative.

While the ordinary or general commissions must be issued only "to the justices of either bench or the justices in Eyre," this limitation does not appear to extend to special commissions or commissions in whatever form issued for doing justice according to law on extraordinary occasions. See *Chitty's Prerog.* 77; *Hawkins P. C.*, book ii., ch. 5, sec. 24 to secs. 32, 34, 37, inclusive; 2 *Hale's P. C.* 22.

The issue of such a commission to some place where none of the ordinary justices of the Superior Courts of law could be either found or expected to be found must, in the absence of legislative prohibition, still rest on Royal prerogative. See 1 *Chitty's Crim. Law*, 149; 4 *Bl. Com.*, 3rd ed., 310.

Governors of colonies are in general invested with this

royal authority. *Primâ facie* their acts on behalf of the Sovereign are good. And unless their acts on behalf of the Sovereign are contrary to the law of the land where exercised, the Sovereign alone can disallow them. See *Chitty's Prerog.*, 34; *Chalmer's Opinions*, 238, 300, 484; *Forsyth*, 167.

The prerogatives of the Crown are not to be deemed as abridged or restricted by mere general words of legislation. The language must be express and free from ambiguity. If the language used be consistent with the existence of the prerogative, it must be held that the prerogative is not affected.

It is to be presumed that the Legislature does not intend to deprive the Crown of any prerogative unless it expresses its intention to do so in explicit terms or makes the inference irresistible: *Willton v. Berkley*, Plow. 223, 239; *Rex v. Cook*, 3 T. R. 519, 521; *Attorney-General v. Newman*, 1 Price 438; *Attorney-General v. Bertrand*, L. R. 1 P. C. 520; *Regina v. Davidson*, 21 U. C. R. 41; *Maxwell on Interpretation of Statutes*, 112, 118.

The Legislature of the former Province of Upper Canada and of the late Province of Canada, while making provision for the issue of ordinary commissions of Oyer and Terminer and General Gaol Delivery, were most careful not to be understood as interfering with the prerogative of the Crown as to the issue of special commissions on extraordinary occasions.

The declaration in the Act of 1822 is, "that nothing herein contained shall prevent, or be construed to prevent, the Governor, Lieutenant-Governor, or person administering the Government of this Province, from issuing a special commission or commissions for the trial of one or more offender or offenders upon extraordinary occasions, when he shall deem it requisite or expedient that such commissions should issue": 2 Geo. IV. ch. 1, sec. 28.

Similar cautious language was used in the Act of 1837, 7 Wm. IV. ch. 1, sec. 8; the Act of 1856, 19 Vic. ch. 43, sec. 152, and the Act of 1857, 20 Vic. ch. 57, sec. 30.

These Acts are the origin of section 6 of Consol. Stat. U. C. ch. 11, to which reference was made on the argument.

The only one of these Acts which, prior to the union of the Provinces of Upper and Lower Canada, made any allusion to the issue of ordinary commissions for new or outlying districts, was, 7 Wm. IV. ch. 1, section 8, which contained these words: "Nothing contained in this Act shall render it necessary to hold any Court in any new district of this Province lately organized, or hereafter to be organized, at an earlier period than is or may be provided in the Act erecting such new district."

In the Act which was passed after the union of the Provinces of Upper and Lower Canada, 16 Vic. ch. 176, making better provision for the administration of justice in the unorganized tracts of country in Upper Canada, there is a similar provision. It is as follows: "It shall be lawful for the Governor of this Province from time to time, and at all times hereafter, during the continuance of any such provisional judicial district or provisional judicial districts, whenever it may be deemed advisable and expedient to do so, to issue the necessary commissions authorizing the holding of Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery in any such provisional juridical district or provisional juridical districts so formed as aforesaid": Sec. 2.

This enactment is the origin of section 93 of Consol. Stat. U. C. ch. 128, to which reference was also made on the argument.

While some portions of the Consol. Stat. U. C. ch. 11, appear to apply only to the settled parts of the Province where there is a complete organization of counties, the whole of Consol. Stat. U. C. ch. 128, applies to what are called or known as "the unorganized tracts."

And while the former expressly affirms the right of the Governor to issue special commissions of Oyer and Terminer, or of Gaol Delivery, for the trial of offenders whenever he deems it expedient, the latter in no manner prohibits or interferes with the exercise of that prerogative.

The only conclusion to be drawn from these premises is, that the prerogative as to the issue of special commissions of Oyer and Terminer, and General Gaol Delivery exists in all its integrity in the case of what are now known as the unorganized tracts or provisional judicial districts.

If in this case exercised by the proper colonial authority, it has certainly been wisely exercised by including in the commission, as one of the quorum, the Judge of the provisional district of Algoma, who by statute has all the powers in that district possessed by any County Judge in the organized territory of this province: Consol. Stat. U. C. ch. 128, sec. 94.

The exercise of the power by the Governor-General of the Dominion, or by the Lieutenant-Governor of the Province, is not inconsistent either with sub-sec. 27 of sec. 91, or sub-sec. 14 of sec. 92 of the B. N. A. Act.

The first empowers the Legislature of the Dominion to make laws in relation to the criminal law, except the constitution of the Courts of criminal jurisdiction, but including the procedure in criminal matters.

The second empowers the Legislature of the Province to make laws in relation to the administration of justice in the Province, including the constitution, maintenance, and organization of provincial Courts both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts.

But neither Legislature has as yet attempted to interfere with the prerogative as to special commissions in the case of the unorganized tracts of country or provisional judicial districts, and when either Legislature shall attempt to do so, it will be time enough to decide which, under the B. N. A. Act, has the power to do so.

There still remains the question as to where, since confederation, the prerogative power exists.

The B. N. A. Act, in sec. 9, enacts that the Executive Government and authority of and over Canada "is hereby declared to continue and be vested in the Queen."

The power being a prerogative one, can only be exercised

by the Queen or her representative. The Governor-General of Canada is the only executive officer provided for by the Act who answers this description. The Act, however, by section 14 makes it lawful for the Queen if she see fit to authorize the Governor-General from time to time to appoint any person or persons, jointly or severally, to be her deputy or deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the Governor-General *such* of the powers, authorities, and functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen.

The commission issued by the Dominion Government is tested in the name of the Honorable William Buell Richards, deputy of the Governor-General of Canada, and as there is no statement to the contrary in the case, I must assume that the Queen authorized the appointment of a Deputy Governor, and that the prerogative power in question was conferred by the Governor-General on the Deputy Governor without any limitation or direction on the part of the Queen, and so that it has been exercised by the proper authority.

I am therefore of opinion—

1. That Judge McCrea was legally eligible and legally competent to act under a commission of Oyer and Terminer and General Gaol Delivery properly issued.
2. That such commission was properly issued by the Deputy Governor of the Dominion of Canada.
3. That the appointment and acting of Judge McCrea under the last mentioned commission was legal.

I express no opinion as to the authority to issue such a commission either under Consol. Stat. U. C. ch. 11, or Consol. Stat. U. C. ch. 128, independently of the prerogative of the Crown, or as to the Government empowered to issue such a commission when issued under either of these statutes.

In my opinion the conviction must be affirmed.

ARMOUR, J., took no part in the judgment, not having been present at the argument.

Conviction affirmed.

MCMMASTER ET AL. V. KING.

Insolvent Act of 1875—Deed of composition and discharge—Estoppel.

Declaration on promissory notes, and on the common counts, alleging at the end of each count that the imprisonment of the defendant is permitted for enforcing payment: that the defendant, being a trader, purchased goods from the plaintiffs, and gave the notes declared on for part of the price, knowing and concealing from the plaintiffs the fact that he was unable to meet his engagements, with intent to defraud them, &c. Plea, that defendant having become an insolvent under the Act of 1875, the plaintiffs proved their claim on his estate: that defendant procured a deed of composition and discharge duly executed by the requisite proportion of his creditors in number and value (setting it out) whereby in consideration of 30cts in the \$, which defendant and three sureties for him covenanted to give their notes for and to pay, the creditors released their claims against defendant, and authorized the assignee to give up to him his estate: that the plaintiffs had notice of and made no objection to this deed, which was duly confirmed by the Judge, and that they accepted the notes for the composition, and received payment of one of them. Replication, that the imprisonment of defendant is permitted in respect of the causes of action declared on, and that the plaintiffs did not consent that the discharge pleaded should apply to these debts. Rejoinder, that the plaintiffs' claim was set forth in the list and proved by them as an ordinary debt, not as one for which defendant ought to be imprisoned, or to which a discharge under the Act would not apply without their consent; nor did they claim that it was such a debt, nor that they could receive a dividend from the defendant's estate without being affected by the discharge. And the plaintiffs, with notice of all the facts on which they now charge that defendant may be imprisoned, appeared at the first meeting of defendant's creditors and proved their claim, and voted thereat as ordinary creditors therefor. And the defendant and his sureties, believing it to be such a claim, and having no notice to the contrary, covenanted to pay the composition, and the plaintiffs accepted the notes therefor, one of which has been paid to them, whereby the plaintiffs' claim is discharged, and they are estopped from this action.

Held, on demurrer, WILSON, J., dissenting, that the plea and rejoinder were good, and the replication bad, for that the plaintiffs, under the facts stated, had precluded themselves from enforcing their claim.

Held, also, that the rejoinder was not a departure from the plea.

DEMURRER. The declaration continued four counts. The first three on promissory notes made by the defendant,

payable to the plaintiffs, for \$390 each, payable respectively at two, three, and four months, which periods had elapsed before the commencement of the suit; and the fourth count, the common money count.

At the end of each of the first three counts were the following words: "And the plaintiffs allege that the imprisonment of the said debtor, the defendant herein, is permitted for enforcing payment of the said promissory note. And the plaintiffs claim \$400.

The like allegation was at the close of the fourth count, only substituting the word *debts* for *promissory note*, and concluding that "the plaintiffs claim 800."

The declaration closed with the following averments: That during the months of November, December, January, and February last, the plaintiffs at the city of Toronto, at the request of the defendant, being a trader within the meaning of the Insolvent Act of 1875, and purchasing for himself, bargained, sold, and delivered certain goods, wares, or merchandise, amounting in value to \$1800, to the defendant as such trader as aforesaid; and the plaintiffs, at the request of the defendant, gave him time, or a term of credit for payment of the price of the said goods, wares, or merchandise, so thereby becoming his creditors as aforesaid: that at the time the defendant purchased the said goods, and obtained credit for payment of the price thereof, for part of which said price he gave the several promissory notes in the first, second, and third counts mentioned, he, the defendant, knew he was unable to meet his engagements, and concealed the fact of such inability from the plaintiffs, so thereby becoming his creditors as aforesaid, with the intention to defraud the plaintiffs as such creditors: that the defendant, by a false pretence, obtained a term of credit as aforesaid, for payment of the price of the said goods so purchased by him as aforesaid, with intent to defraud the plaintiffs, so thereby becoming his creditors as aforesaid; and the defendant has not paid, or caused to be paid, the debts so incurred as aforesaid, although the time for payment thereof has long elapsed. And the plaintiffs

charge that the defendant, since the incurring of the said debts as aforesaid, has become insolvent, and has made an assignment under the provisions of the Insolvent Act of 1875; and that the defendant, by reason of the premises, was, and is guilty of fraud within the meaning of section 136 of the said statute. And the plaintiffs claim in this action \$1800, and at the trial thereof they will seek to establish the fraud so charged against the defendant as aforesaid, in pursuance of the Insolvent Act of 1875.

Pleas. 7, to the whole declaration : That after the making of the said promissory notes, and after incurring the debts in the declaration mentioned, and on or about the 28th of March, 1877, he being then, as now, a trader and insolvent within the meaning of the Insolvent Act of 1875, duly executed a deed of assignment under the said Act, to David Watson Campbell, an official assignee in and for the county of Halton, in which county the defendant then resided and carried on his business as a merchant : that the said Campbell was subsequently duly appointed the assignee of the defendant's estate : that previous to the discharge, and in time to permit the plaintiffs obtaining the same dividends as the other creditors upon his estate, the defendant furnished the said assignee with a list of his creditors, and a sworn statement of his assets and liabilities, in which list the plaintiffs, who carry on business under the name, style and firm of A. R. McMaster & Brothers, appear as creditors of the defendant for their claim in the declaration mentioned, and the plaintiffs proved their said claim upon the defendant's estate : that the defendant procured a deed of composition and discharge with his creditors, duly executed by the defendant, and by the majority in number of his creditors who had proved claims to the amount of \$100, and upwards, and who represented at least three-fourths in value of all the claims of \$100, and upwards, which had been so proved, which deed is in the words and figures following. Then followed the deed, the material parts of which were :

The defendant is the party of the first part. Charles H.

King, George Goulding, and Orrin Henry, sureties, for the defendant, are the parties of the second part, and the several firms and corporations who are creditors of the insolvent, of the third part, and David Watson Campbell, official assignee, of the fourth part. The indenture witnessed, that in consideration of the defendant's indebtedness, and of the discharge thereby given, the defendant covenanted and agreed with all his creditors collectively and severally, that he would pay to them, and to each of them, a composition of 30 cents in the \$, of their respective claims against him, in manner and at the times therein stated, and to give his promissory notes for such respective payments endorsed by the sureties.

And the defendant and sureties covenanted to pay the expenses of the insolvency proceedings, and in consideration of the discharge thereafter given the sureties thereby covenanted and agreed with the assignee and creditors, collectively and severally, that upon execution of the deed as therein mentioned, they would forthwith deliver, or cause to be delivered to the creditors, or to be left with the assignee for them, the said promissory notes of the insolvent, duly endorsed by them; and in consideration of the composition payments so to be made, and of the endorsation of the said notes by the sureties, the creditors and each of them did release and discharge unto the insolvent all their respective claims against him, provided that nothing therein contained should operate any change in the liability of any person secondarily liable to the creditors, or any of them, for the debts of the insolvent, &c., &c., the said creditors thereby expressly reserving all their claims and remedies against any person other than the insolvent, and in respect of any securities held by them, or any of them.

And the creditors did thereby direct and authorize the assignee to deliver to the insolvent all his estate and effects upon the deed of composition and discharge being executed by the majority in number of the creditors who had proved their claims to the amount of \$100, and upwards, and who represented at least three-fourths in value of all

the claims of \$100, and upwards, which had been so proved, and upon payment by the insolvent to the assignee of a sufficient sum to cover the expenses of the insolvency and the preferential claims.

It was then averred that the plaintiffs had notice of the deed, and that all proceedings were taken to obtain the confirmation of the said deed, as in the said Act was provided; and that the plaintiff did not, nor did any creditor of the defendant, or the assignee, or any other person, make any objection or opposition to the deed, nor did any person appear and oppose the granting of the application of the defendant for an order confirming the deed of composition and discharge; and the deed was, on the 5th of July, 1877, duly and absolutely confirmed by the order of John Dewar, Esq., the Deputy Judge of the County Court of the county of Halton; that the defendant left the composition notes of the plaintiffs for their said claim with the assignee as provided by the deed, and the plaintiffs accepted the composition notes, one of which has since been paid to the plaintiffs, and the plaintiffs still hold the other three composition notes upon their said claim.

Replication: 2, to the seventh plea: that the imprisonment of the defendant is permitted in respect of the causes of action in the declaration mentioned; and the plaintiffs did not consent that the discharge in the seventh plea referred to, should apply to the debt in respect of which the action is brought.

Rejoinder: 2, to the second replication to the seventh plea: that the facts stated in the seventh plea are true. That the plaintiffs' claim in the declaration mentioned was set forth in the list in the plea mentioned as an ordinary debt, and not as a claim or debt for enforcing payment of which the imprisonment of the defendant is permitted by the Insolvent Act of 1875, nor as a claim or debt to which a discharge under the said Act does not apply without the consent of the plaintiffs. And the plaintiffs proved their said claim upon the defendant's estate in the ordinary way as an ordinary debt, and not as a debt or claim for

enforcing payment of which the imprisonment of the defendant is permitted by the said Act, nor as a claim or debt to which a discharge under the Act does not apply without the consent of the plaintiffs. Nor did the plaintiffs in the said claim so proved claim the right to imprison the defendant, or that the discharge of the defendant would not apply to the said claim or debt without their consent; or that the plaintiffs were entitled to receive a dividend from the defendant's estate without being affected by the defendant's discharge under the said Act. And the plaintiffs, with notice of the facts upon which they now charge that the defendant is liable to imprisonment, appeared at the first meeting of the defendant's creditors held under the said Act, and proved their said claim at that meeting, and voted and acted at said meeting as ordinary creditors for the amount of their said claim. And the defendant and the sureties in the deed of composition and discharge, believing that the plaintiffs' said claim or debt was an ordinary claim or debt, and without any notice to the contrary in that behalf, covenanted and agreed to pay the defendant's creditors the composition moneys and to deliver the promissory notes in the deed mentioned, and the plaintiffs accepted the composition notes, one of which has since been paid to the plaintiffs, whereby the plaintiffs' claim, in the declaration mentioned, was and is wholly discharged, and the plaintiffs debarred and estopped from prosecuting this action.

Demurrer to the second rejoinder, on the grounds:

That no act of the plaintiffs in proving their claim and in voting, as in the rejoinder alleged, amounts to a waiver of the statutory rights of the plaintiffs. The statute enacting that without the express consent of the creditor a discharge shall not apply to any debt for enforcing payment of which the imprisonment of the debtor is permitted.

And that the plaintiffs were not bound to give notice to the defendant of his liability after discharge in respect of the debt herein sued for, the facts being within the knowledge of the defendant he must be presumed to have entered

into the said composition with full notice and knowledge of the plaintiffs' rights in the premises.

Joinder in demurrer : and notice of the following exceptions to the declaration : that the declaration should not contain any averments of fraud or false pretence : that it is not alleged that at the time of the alleged purchase from the plaintiffs, the defendant was insolvent ; and the declaration shews that he became insolvent afterwards : that it is not alleged the defendant was insolvent and knew his insolvency at the time of the alleged false pretence.

There were two exceptions taken to the allegation as to imprisonment at the end of the respective counts, to the effect that it was informal and surplusage. Notice of exceptions was also given to the second replication to the seventh plea : that the replication is no answer to the plea, because the plaintiffs cannot accept the benefit of the composition deed without being bound by its terms, and the deed in express terms releases the defendant. That secs. 63, 136 of the Insolvent Act of 1875, being in the nature of a penal statute must be construed strictly, and sec. 63 only allows a creditor to accept a dividend out of the estate. A composition deed is a new contract between the insolvent, the creditors and the insolvent's sureties, and the object of the deed is to take the estate out of insolvency and to relieve the insolvent from his liabilities ; and in consequence of the composition agreed to be paid the creditors release him. When, therefore, the creditors accept a composition under a deed of composition, which expressly releases the insolvent, they are bound by the deed, and must be taken to have consented in the terms of the deed to the insolvent's discharge from their debt.

That section 104 of the Insolvent Act, and form P, require that the creditor should state the nature and particulars of the claim. The Act draws a distinction between debts to which a discharge applies, and debts to which a discharge does not apply. A creditor must therefore state to which class his debt belongs, in order that the assignee may properly record and classify the same, and that all persons interested in the insolvency proceed-

ings may have notice thereof, and the Court or Judge make the necessary reservations in granting the discharge; and the creditor must, in his claim filed, claim all the privileges or benefits to which he may conceive himself entitled. The creditor cannot file his claim as for an ordinary debt, vote and act thereon, accept the benefit of a composition deed, make no objections to the insolvent's discharge as required by the Act, and nevertheless sue for the balance of his claim as the plaintiffs do in this case.

October 23, 1877, the demurrer was argued before WILSON, J., sitting for the full Court.

W. McDonald, for the demurrer. The allegation as to imprisonment at the end of each count is informal and mere surplusage, and therefore may be rejected. This action was brought before the deed of composition and discharge was executed. He referred to the Insolvent Act of 1875, secs. 63, 136; *Allan v. Garratt*, 30 U. C. R. 165; *Doria on Bankruptcy*, 343, commenting on sec. 49 of the Imperial Act; *Clarke's Insolvent Acts*, pp. 201, 352; *Rutherford v. Eakins*, 27 C. P. 55.

G. Kerr, jr., contra. He referred to the Insolvent Act, 1875, secs. 2, 104, Form P., 82, 102, 136; *Ex parte Ashworth re Hoare*, L. R. 18 Eq. 705; *Clarke's Insolvent Acts*, 245, 252; *Mitchell v. Mitchell*, 27 C. P. 160; *Lewis v. Tudhope*, 27 C. P. 505; *Rooney v. Lyons*, 2 App. 53.

[The arguments sufficiently appear in the causes of demurrer assigned, and in the notices of exception served, and as in the pleadings alleged.]

The sections of the Insolvent Act, 1875, referred to, are as follows:—

Sec 2, sub-sec. *h*. "The word '*creditor*' shall mean every person, co-partnership, or company to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety; but in reference to proceed-

ings at meetings in insolvency, to the right of voting, to the execution of a deed of composition and discharge, the consent to a discharge of an insolvent, or any other consent or action with regard to the management and disposal of the estate of an insolvent, the word '*creditor*' shall mean a person, co-partnership, or company whose unsecured claims to an amount of \$100 or upwards have been proved in the manner provided by this Act, and the proportion of claims in value required to give validity to any such proceeding or action shall be formed of all claims so proved, whether above or under one hundred dollars, and of no others; and with regard to any deed of composition and discharge, or the consent to a discharge of the insolvent, no creditor, whose claim is not affected by such discharge shall be reckoned as one of the required number of creditors, nor shall his claim be reckoned as forming part of the proportion of claims required to give effect to such composition and discharge."

Sec. 63: "A discharge under this Act shall not apply, without the express consent of the creditor, to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by this Act, * * nor shall debts to which a discharge under this Act does not apply, nor any privileged debts, nor the creditors thereof, be computed in ascertaining whether a sufficient proportion of the creditor of the insolvent have voted upon, done, or consented to any act, matter or thing under this Act; but the creditors of any such debt may claim and accept a dividend thereon from the estate without being by reason thereof in any respect affected by any discharge obtained by the insolvent."

Sec. 82: "In the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, * * but no dividend shall be allotted or paid to any creditor holding security for the estate of the insolvent for his claim, until the amount for which he shall rank as a creditor upon the estate as to dividends therefrom shall be established as hereinafter provided; and such amount shall be the amount which he shall be held to represent in voting at meetings of creditors, and in computing the proportion of creditors whenever under this Act, such proportion is required to be ascertained."

Sec. 102: "All questions discussed at meetings of creditors shall be decided by the majority in number and in

value of the creditors having a right to vote under section two, present or represented at such meeting, and representing also the majority in value of such creditors, unless herein otherwise specially provided ; but if the majority in number do not agree with the majority in value, the views of each section of the creditors shall be embodied in resolutions, and such resolutions, with a statement of the vote taken thereon, shall be referred to the Judge who shall decide between them."

Sec. 104 : "The claims of creditors furnished to the assignee in the form P., attested under oath and accompanied by the vouchers on which they are based, or when vouchers cannot be produced accompanied by such affidavit or other evidence as in the opinion of the assignee shall justify the absence of such vouchers, shall be considered as proved unless contested, in which case the claims shall be established by legal evidence on the points raised."

Sec. 136 : "Any person who for himself * * * purchases goods on credit * * * knowing or having probable cause for believing himself * * * to be unable to meet his engagements, and concealing the fact from the person thereby becoming his creditor, with the intent to defraud such person, or who by any false pretence obtains a term of credit for the payment of * * * the price or any part of the price of any goods, wares or merchandise, with intent to defraud the person thereby becoming his creditor * * * and who shall not afterwards have paid or cause to be paid the debt or debts so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the Court may order, not exceeding two years, unless the debt and costs be sooner paid ; provided always, that in the suit or proceeding taken for the recovery of such debt or debts, the defendant be charged with such fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding."

November 20, 1877. WILSON, J.—The allegation at the end of each count that imprisonment may be awarded for non-payment of the claim made in that count, is so utterly useless that it may be struck out as surplusage. As well might the plaintiff state that process against goods and chattels might issue upon such a claim.

As a claim made by a creditor against an insolvent who has purchased goods on credit, knowing or having probable cause for believing himself to be unable to meet his engagements, and concealing the fact from his creditor with intent to defraud him, or who by any false pretence obtains credit for payment of the price, or any part of the price, of any goods, with intent to defraud his creditor, and who does not afterwards pay for the same, is guilty of a fraud and liable to imprisonment by sec. 136; and as by sec. 63 a discharge under the Act does not apply to such a debt without the express consent of the creditor, and as such a debt and the creditor of such a debt are not to be computed in ascertaining whether a sufficient proportion of the creditors have voted upon, done, or consented to any act, matter, or thing under the Act, was it necessary the plaintiffs, as such creditors, should have put in their claim as one for which the debtor might be imprisoned under the Act, or have otherwise so distinguished it from ordinary claims put in that it might be known by the assignee and by the other creditors—and perhaps by the debtor—that such claim and such creditors was and were not to be computed in ascertaining whether a sufficient proportion of the creditors had voted upon, done, or consented to any act, matter, or thing under the Act?

The claim is to be according to the form P. referred to in sec. 104. The claim or affidavit should state the nature and particulars of the claim.

If it is for rent under sec. 74, that will appear in the claim made. So also if the creditor hold security: Sec. 84. So also if the claim be by a clerk or other employee of the insolvent: Sec. 91.

The claim should always shew the nature and particulars of the claim, whether it is upon a promissory note or open or settled account, and the particulars of it, a mortgage, judgment, or whatever else it may be.

And the assignee is, in the preparation of the dividend sheet, to have due regard to the rank and privilege of every creditor: Sec. 82.

I know of nothing in the statute which requires that the creditor shall in his claim shew whether the debt in question was in his opinion founded upon the fraud of the debtor or not; nor whether the judgment on which the claim is made was for damages for libel or the like.

It may be there will be a difficulty in the assignee or the other creditors knowing whether any particular claim made is one for which imprisonment of the debtor is permitted by the Act, or is founded upon a recovery for libel or the like, and so they may not be able to tell whether such debts and the creditors representing them should or should not be computed in determining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter, or thing under the Act.

Such creditors in sec. 63 mentioned are not prevented from attending the meetings of creditors and from expressing their opinions as to the management and disposal of the estate, either under sec. 2, sub-sec. *h*, or under sec. 63; but their votes are not to be computed under either of these sections. It is not said they shall not vote. The Act by sec. 63 does not apply to any such claims which are mentioned therein "without the express consent of the creditor;" and under sec. 2, sub-sec. *h*, "no creditor whose claim is not affected by the discharge of the insolvent shall be reckoned as one of the required number of creditors, nor shall his claim be reckoned as forming part of the proportion of claims required to give effect to such composition and discharge."

As the statute does not require the claim to be in any other form than is mentioned in section 104 and form P., and as the plaintiffs, I must assume, did duly and sufficiently present such claim, they did in that respect all that they were called upon to do.

It must, therefore, be a matter of fact whether the plaintiffs did or did not expressly consent to the discharge of the insolvent; or whether the plaintiffs, as creditors, were or were not, or the debt which they claimed was or was not,

computed in ascertaining whether a sufficient proportion of the creditors did vote upon, do or consent to any act, matter, or thing under the Act, under sec. 63 ; or whether the plaintiffs were or were not reckoned among the required number of creditors to give effect to the discharge ; or whether their claim was or was not reckoned as forming a part of the proportion of claims required to give effect to the composition and discharge under sec. 2, sub-sec. *h*.

If the plaintiffs voted for the discharge, that I presume, especially if it were reckoned among the other votes, would be an "express consent" to the discharge, or it would be evidence of it at any rate, and so their vote on such occasion could not prejudice the insolvent or any other person, if the plaintiffs are held to the consequences of so voting. If they voted against the discharge, their vote must either have been counted or not counted. If it were counted, their vote must have been counteracted by a superior number of creditors and by a greater amount of claims, which were in favour of the discharge, even reckoning the plaintiffs unauthorized vote and claim in opposition ; and so that vote did no prejudice in fact to the debtor or to any one else ; although it was wrongly and improperly reckoned in the decision of the question, and a negative vote of that kind, I think, cannot be considered as evidence of an *express consent* by the plaintiffs to discharge the defendant from any part of their claim.

If their vote were not counted, then it cannot certainly be said that the plaintiffs expressly consented to the defendant's discharge, and when the mere act of voting is not prohibited by the statute.

If creditors voted adversely to the debtor when they should not have voted, and their votes were counted, and the effect was to prevent the discharge being given when it would have been carried if such unauthorized votes had not been counted, that could afterwards be corrected by excluding such votes. But whether such votes were excluded or not could make no difference so long as they were adverse, because if they prevented the discharge, then

such persons could still sue because there was no discharge in fact, and if they did not prevent the discharge their adverse voting would not constitute an express consent on their part to the discharge being given.

But such creditors voting for the discharge might, as I have before said, constitute or be evidence of an express consent to discharge the debtor.

In this case it is averred by the plaintiffs that they did not expressly consent to the discharge, and it is not denied by the defendant.

Then it is said by the defendant that although the plaintiffs were not bound by the discharge, because they are not parties to it and did not expressly consent to it, they have since become bound by it because they have accepted the composition notes which were given, and have received payment of one of them and still hold the other.

The plaintiffs contend that inasmuch as sec. 63 declares "that the creditor of any such debt" (and the plaintiffs are such creditors) "may claim and accept a dividend thereon from the estate without being by reason thereof in any respect affected by any discharge obtained by the insolvent," they cannot be considered to have expressly consented to the discharge by the acceptance of the composition notes and by receiving payment of one of them and by retaining the other.

The defendant says that the Act only declares that the acceptance by the creditor of any such debtor who accepts "a dividend thereon from the estate" shall not be affected by the discharge; and that these composition notes are not a *dividend*, and are not a dividend *from the estate*, but are a new and special contract by the debtor and by his sureties as endorsers and covenantors to pay such notes.

The expression *dividends* throughout the Act is applied to partial payments on account of the whole debts, which are made from and out of the proceeds of the estate, and no doubt that is the general sense in which the term is used.

But there is no statutory meaning given of the word, and

I do not think I should hold that "dividend from the estate" meant only a payment made by the assignee out of the estate while he had it in his hands in insolvency. A composition is a dividend generally. This composition of 30 cents in the \$, is certainly an agreement to pay a dividend in place of the whole debt, and to discharge the estate of the debtor, which he got back again, so far as regards those creditors who are bound by the discharge, and the plaintiffs among the number, if they are bound.

The dividends referred to in sec. 63, are those which are paid out of the estate after the discharge has been given, and these dividends so accepted are not to affect the rights of the creditors who are not bound by the discharge.

The rights which are saved by that section, are not only against a simple discharge, but also against a composition and discharge which is not mentioned in that section, because it is manifest that the debts therein specially protected are to be protected against any discharge of the insolvent.

It is manifest also that all such protected creditors may become parties to the insolvency proceedings, and may receive dividends from the estate. But what they receive cannot be called a dividend upon their debt. It is not a *dividend* as regards the creditor at all; his whole debt remains throughout the proceedings due and payable to him—less the payments, or, as they are called in the statute, dividends from the estate, which are made to him.

I am of opinion that all payments made after the discharge, whether by the assignee literally *from the estate*—and as *dividends*—or by the debtor or other friend for him under a composition and discharge, by which the debtor, as in this case, gets his estate back again, may be treated as dividends from the estate, because they are made as for such dividends and in lieu of them.

Such payments are not properly *dividends* as regards the debts of such protected creditors, but they may be called dividends from the debtor's estate.

I think the statute meant to protect such claims from

being defeated or affected by any payment made by or for the insolvent after his discharge, unless to the extent of such payment, until the debt itself was fully acquitted, and that is the way in which I shall construe it. It is that declaration at the end of sec. 63 about the claim of such protected creditors not being affected by the receipt of any dividends from the estate which creates the difficulty; and if the payment in this case under the composition be not considered as a dividend from the estate, according to the argument of the defendant, then that provision in the section does not apply here at all.

The general purport of the rest of the section must then prevail, and it is this, "A discharge under this Act shall not apply without the express consent of the creditor to any debt," such as the debt now sued for.

The deed pleaded by the defendant is a discharge under the Act, and it cannot therefore affect this debt without the plaintiffs' express consent, which it is admitted may be given.

The plaintiffs were, however, entitled to participate in the defendant's estate while it was in insolvency. Why should they not be entitled to participate in it still, when it has, against their express consent, been taken out of insolvency by the acts of the other creditors? And how can that discharge affect the plaintiffs by the defendant carrying out the conditions of the discharge, which he voluntarily engaged to perform and which were forced upon the plaintiffs, when the statute declares that the discharge shall not affect this debt at all?

It is made to affect the debt if the performance by the defendant of what he engaged to do by its very terms is to bar the plaintiffs from suing for that debt.

Whether the composition notes or their payment is to be treated as a dividend from the estate, or a mere payment provided to be made in and by the composition and discharge on the defendant getting his estate out of insolvency and back again into his own hands, the plaintiffs are entitled to prevail by the provisions and operation of the statute.

But the defendant's counsel put his defence upon a still higher ground. He contended that as the discharge was general and absolute in its form, it covered also debts which were provable, unless they were specially excepted from its operation. I shall not, in the face of this statute, discuss that question.

The defendant in his plea has claimed to be discharged by force of the deed of composition and discharge, and by reason of the plaintiffs' acceptance of the composition notes and the receipt of payment of one of them.

These subsequent acts, I understand, are relied on as matters which shew that the plaintiffs assented to and thus became parties to the deed, and are therefore bound by it as assenting creditors. In the face of the replication denying any "express consent" of the plaintiffs to the defendant's discharge, the plea is not sufficient in law without an averment of "express consent," and relying merely on an implied assent by such subsequent acts which have no operation, in my opinion, upon this debt.

If the defendant meant to use that plea as one of accord and satisfaction, by reason of the plaintiffs' acts subsequent to the execution of the discharge, he should have averred distinctly that the acceptance of the composition notes and the payment of one of them, or one or the other of these acts was in accord and satisfaction, and no doubt the acceptance of notes—and especially endorsed by sureties—though for a smaller sum, would be a good accord and satisfaction, if such an arrangement was in truth made; but I imagine no such case as that could be proved.

The allegations that the plaintiffs did not oppose the discharge and composition, or the confirmation of it, are of no consequence, because the plaintiffs were prevented from voting on the question, and they may not have considered it worth their while to oppose it when they were excluded from giving any effectual opposition to it by their vote and the nature of their claim, and when their claim in full was assured to them by the Act. The statute requires more than mere passive conduct to bind them in such a

case ; it requires their "express consent," which the defendant did not get.

As to the second rejoinder. I am of opinion it adds nothing to the defendant's case. It is of no consequence, as I have already said, in my opinion, that the plaintiffs put in and proved their claim as an ordinary debt, and not as one for enforcing payment of which imprisonment of the defendant was permitted, nor as one to which the defendant's discharge could not apply without their express consent ; nor that the plaintiffs at the first meeting of the defendant's creditors, with a knowledge of all these facts, voted and acted at the meeting as ordinary creditors for their claims, for the reasons already given, at any rate so long as their vote was not reckoned upon and did not influence the result of the proceedings ; besides, it must be shewn what matters they were upon which such vote and action were made, where the statute require the *express consent* of the creditors ; unlike the English Act, which mentions only *the consent* to bind the creditor by the discharge.

The rejoinder, in addition to these matters, states that the defendants and the sureties in the deed of composition and discharge, believing that the plaintiffs' claim was an ordinary debt, and without any notice to the contrary, covenanted to pay the defendant's creditors the composition moneys, and to deliver the promissory notes in the deed mentioned ; and the plaintiffs accepted the notes, one of which has since been paid to the plaintiffs ; whereby the plaintiff's claim in the declaration mentioned, was and is wholly discharged and the plaintiffs debarred and estopped from prosecuting this action. That rejoinder, I am of opinion, is a departure from the seventh plea, which sets up the deed of composition and discharge, and the plaintiffs' acceptance of the composition notes, and the payment of one of them, as a bar to the action.

The rejoinder should have been pleaded as a separate plea, and not in support of the facts relied upon in the seventh plea.

It is said that if the defendant's case cannot be supported, the defendant and his sureties—and it may be added the rest of his unpaid creditors—have been grievously wronged by means of the deed of composition and discharge being entered into, and by the defendant being led to make a new arrangement with his creditors; and by the sureties being drawn into a bargain to aid the defendant in paying the composition notes; and by all these parties being induced to believe and believing that the settlement made by the composition and discharge, was a final and binding one upon every one—while all the time the plaintiffs, with a knowledge of these facts, proved their claim and voted and acted as ordinary creditors at the first meeting, and did not inform any of the parties interested that their claim was one upon which the discharge would have no operation without their express consent, because the defendant had incurred his debt with them in fraud, which entitled them to claim their whole debt, notwithstanding any discharge that might or would be given to the defendant, and without informing the parties that the plaintiffs intended so to claim it notwithstanding the discharge.

I confess there is very great force in these facts. The defendant has got back his estate, upon the general body of his creditors losing 70 per cent. of their debts. And these creditors after participating equally with the plaintiffs in the estate and its dividends, have agreed, to take the defendant and his sureties for the remaining thirty per cent., relying, no doubt, on the fact that the defendant in the possession of his estate, and left at liberty without fear of suit or disturbance from any old transaction, will probably, with the aid of his sureties, be able to meet the due payment of his composition notes. And they now find that the plaintiffs, while taking the 30 per cent., have not given up the 70 per cent., and that the plaintiffs claim the right to imprison the defendant, which will prevent him from attending to the estate which he has got back, and as a consequence, will make him less able to pay his general creditors their 30 per cent. as the

instalments mature, while the plaintiffs are claiming the immediate payment of their entire debt, and to be free from the binding effect and operation of the deed of discharge to the defendant by which the other creditors are bound.

The sureties have also a strong semblance of complaint. They say they have been drawn into an engagement for the defendant which they would never have entered into if they had known the nature of the plaintiffs' claim and the powers which they could exercise against the defendant and his estate, notwithstanding the discharge which had been granted to him; and notwithstanding the payments which he and his sureties have bound themselves to make to all the creditors of the defendant, the plaintiffs included, and which they have made.

The plaintiffs say they did all they were bound or required to do. They were not called upon to give notice of the manner in which the defendant had contracted his debt with them, nor of the power which they had by reason of the defendant's fraud to enforce the payment of their whole debt, nor of their intention to use such power; and that so far as the defendant is concerned, he did not require to have notice of the manner in which he had contracted the debt, as he must be presumed to have known the consequences of his conduct, and that he could not therefore have been misled by anything which the plaintiffs did or did not do.

The plaintiffs say also as to the sureties, that the plaintiffs did not induce or procure them to bind themselves for the defendant: that they were the defendant's friends, and bound themselves for his sake, and they must blame him for not communicating to them all the facts and matters which it was material for them to be informed of by him; and as to both sureties and creditors, that they knew the plaintiffs were not assenting parties to the discharge, and that they did not execute it, and it was their place, with that notice and knowledge, to enquire why and for what cause they did not assent to it.

They all knew the statute did not bar every claim which was proved, and that there were many claims which were specially exempted from being affected by the discharge, and it was their place and duty, if they wanted information respecting any claim which was proved, to make the enquiry whether it was a protected debt or not, and especially to make such enquiry when the plaintiffs did not execute or assent to the deed. The statute gave a special benefit to those who did not expressly consent to it, and bound only those who did expressly consent to it, and so in effect required the special assent of every creditor to make it certainly binding for all purposes upon him. If, therefore, they chose to be content with the mere fact that they had got the requisite number of creditors representing the specified amount of debts to give the discharge, and to consider that an effectual release of every claim, notwithstanding they knew there were many claims which such a release, not expressly assented to, however general its terms, did not extinguish, and without enquiry of any kind, whether those who did not expressly consent, held back or dissented because they had such protected claims; and if they chose to bargain and contract between themselves without regard to the plaintiffs or their claim, or to their consent, it may be said they should bear the consequences, unless they can shew that the statute or some imperative rule of law bound the plaintiffs to communicate voluntarily to the assignee, or the creditors, and to the defendant and his sureties, the complaint of fraud which they had against the defendant for the manner in which he had contracted his debt with them, and that they had the intention to prosecute such charge against the defendant, notwithstanding the proceedings in insolvency, or any discharge which should be given to him.

If that argument for the plaintiffs cannot be answered in law, they are, however much the parties opposed to them may have been mistaken, or are prejudiced, entitled to recover in this action.

Now, the statute does certainly not make it the plain-

tiffs' duty so to act, as the defendant says they should have acted. Does the general law of the land bind them to do so?

If it do, it must be because it is and would be a fraud not to make known all these facts and circumstances. Was there therefore anything fraudulent or wrongful at law on the part of the plaintiffs in doing or in not doing any of the acts or matters which the defendant says they should have done, or they should not have done?

"To constitute fraud, there must be an assertion of something false within the knowledge of the party asserting it, or of the suppression of that which is true, and which it was his duty to communicate." Per Bramwell, B., in *Horsfall v. Thomas*, 1 H. & C. 90, 100.

In *Smith v. Hughes*, L. R. 6 Q. B. 597, Cockburn, C. J., said, p. 602: "We must assume that nothing was said of the defendant's manager desiring to buy *old* oats, nor of the oats having been said to be old. * * * We must assume that the defendant's manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is, whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not. * * * The question is not what a man of scrupulous morality or nice honour would do under such circumstances."

In *Dolman v. Nokes*, 22 Beav. 402, it was decided that it was not generally the duty of a purchaser to inform a vendor of any of the circumstances which may make it desirable for him to purchase. There a first mortgagee with power of sale had engaged to make an advantageous sale of part of the mortgaged property. After that, he bought up at a reduced price the interest of the second mortgagee without informing him of the arrangements for sale he had

made, and that such sale would be sufficient to pay off both mortgages, the second mortgagee believing the property would not sell for sufficient to do that. Held the first mortgagee was not bound to inform the second mortgagee of the opportunity he had of selling, or of the price he could get, or of the value of the property.

There is a difference between contracts of insurance and of guarantee, as to what facts and circumstances must be made known by the party procuring the contract to be made: *The North British Ins. Co. v. Lloyd*, 10 Ex. 523; *Lee v. Jones*, 17 C. B. N. S. 482.

It is the duty of the surety to enquire into the state of accounts between the principal and his creditor, if he desire such information. It is not the duty of the creditor voluntarily to give such information. It is the duty of the principal to inform his surety upon such matters: *Lee v. Jones*, 17 C. B. N. S. 482; *Hamilton v. Watson*, 12 Cl. & F. 109.

Where one gave a guarantee which he knew the one receiving it believed would be paid and was of some value, but which the giver thought was highly improbable it would be paid, and knew and intended it should not be paid, and he kept back from the one receiving it, all the facts and circumstances which made it so improbable the guarantee would be paid—such conduct is evidence of fraud, for which an action will lie against the guarantor: *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259.

I am of opinion that, as the plaintiffs had nothing to do with the composition and discharge—being non-assenting parties to it—and as they had nothing to do with the sureties being brought into the transaction, or with the terms by which they were bound; and as they did all they were bound to do, and did not directly or indirectly induce anything to be done that was done, or conceal or misrepresent any thing whatever; and as no enquiry was made of them on any matter or subject connected with their claim, or with the defendant's conduct in contracting the debt with them; or as to the rights or remedies which they, in

common with a large class of creditors, could and might exercise adversely to the debtor after his discharge, if they were creditors of that particular class; or whether their claim brought them within the number of any of these excepted creditors; that not only are they free from any legal fraud or blame, but the defendant and his sureties, and all others who may think they are aggrieved, are alone in fault for any wrong or injury they may suffer by reason of the exercise by the plaintiffs of statutory rights which are specially secured to them.

The following cases on the subject have a bearing on this case. Some of them were referred to on the argument.

A debt incurred by means of a fraud is excepted from the operation of a discharge given under the English Bankruptcy Act of 1869, ch. 71: *Jenkins v. Fereday*, L. R. 7 C. P. 358.

If a secured creditor vote in respect of his whole debt without producing his security, his vote is valid, but his security is forfeited to the estate: *Ex parte Ashworth*, *Re Hoare*, L. R. 18 Eq. 705.

In *Ex parte Halford—Re Jacobs*, L. R. 19 Eq. 436, a creditor who alleges his debt was contracted fraudulently by the debtor may, after receiving a composition from him under sec. 126 of the Bankruptcy Act of 1869, commence an action against him for the balance of the debt without being obliged to prove to the Court of Bankruptcy a *prima facie* case of fraud. The Court of Bankruptcy has no jurisdiction to interfere with such an action.

Section 15 of the Debtors' Act, 1869, ch. 62, is very similar in its terms under which the creditor in that case brought his action; to our sec. 63—and is a case directly in point.

Ex parte Coker, *Re Blake*, L. R. 10 Ch. 652, shews that an action or suit against the liquidating debtor cannot be stayed when the discharge is not, or would not if granted, be a defence.

A debtor who has arranged with his creditors upon a composition, and who has thus got his estate back, may in-

demnify the person who has become surety for him for part of the composition by a deposit of part of the goods he had got back on making the composition, and the surety will retain such goods against a subsequent liquidation of the debtor. Such deposit with the surety is no fraud upon the creditors who gave up the goods without any stipulation as to what was to be done with them: *Ex parte Burrells, Re Robinson*, L. R. 1 Ch. D. 537.

A secured creditor who proves his debt under a liquidation as being unsecured, without deducting the value of his security, and who votes in favour of a composition in satisfaction of his debt, will not be allowed afterwards to set up his security: *In re Balbirnie—Ex parte Jameson*, L. R. 3 Ch. D. 488.

In my opinion the plaintiffs did all they were bound or required to do, and not more than they had the right to do. They are not answerable for the composition and discharge which was entered into and given. They were not assenting parties to it, and they have not lost any rights which they had before it by reason of it, or by the receipt of the composition notes or payment of any of them.

The defendant's pleadings are, therefore, not sufficient in law to preclude the plaintiffs from recovering their original debt from the insolvent debtor.

The declaration is sufficient in law. The counts are in the ordinary form, striking out the allegation about imprisonment contained in each of them, which is mere surplusage.

The averment of the charge and circumstances of fraud is sufficient under the statute. It is by reason of it that the plaintiffs can alone sustain their claim set forth in the counts. The defendants have not expressly pleaded nor demurred to it. For the purposes of this demurrer, it must be taken to be true.

On the trial the averment must be proved to entitle the plaintiffs to a verdict, whether it is pleaded to or not. It is an anomalous kind of proceeding. It is in fact a criminal prosecution for fraud, attended with imprisonment

as a punishment, to enforce the payment of a debt, and yet the case goes on against the defendant without his appearance or pleading to it, contrary to the course of a criminal prosecution by indictment.

The exceptions to the declaration, because it does not aver the defendant was insolvent or knew of his insolvency at the time of his purchase, are not sustainable. The words of section 136 are: "Knowing or having probable cause for believing himself to be unable to meet his engagements"; and the declaration follows that language. The other exceptions to the declaration are of no moment.

The exceptions to the replication have been already answered.

Upon the whole case—which is one of great importance, and which suggests that amendment might be made in sec. 63 which would make it more plainly serviceable to the debtor and his sureties and creditors, without making it less beneficial to the creditor who had such protected rights, and who reserved them and intended to act upon them—judgment is for the plaintiffs upon demurrer.

From this judgment the defendant appealed, and the case was reheard before the full Court during Michaelmas term last, December 4, 1877.

W. Macdonald, for plaintiffs.

George Kerr, Jr., for defendant.

The arguments and cases cited were the same as those before Wilson, J., *ante* p. 416, and the further cases cited are referred to in the judgment of Wilson, J., 418 *et seq.*

February 4, 1878. HARRISON, C. J.—The plaintiffs sue in respect to a debt for the enforcing of payment of which the imprisonment of the debtor is permitted by the Insolvent Act: Sec. 136.

Defendant if convicted of the fraud alleged is liable to be

imprisoned for a term not exceeding two years, unless the debt and costs be sooner paid: *Ib.*

The effect of the proceedings now instituted, if the plaintiffs are right in their contention, may be to enable them to collect their debt in full, notwithstanding the acceptance by them of the composition notes endorsed by third persons issued under and authorized by a deed which provides for a discharge in full upon acceptance of the composition.

Whether this extraordinary and unforeseen result on the part of the insolvent, his sureties and of his creditors, can, in a Court of law or equity, be permitted may depend on the provisions of the Insolvent Act.

If these provisions are clear beyond doubt in favour of such a construction, our simple duty will be to give effect to the apparent intention of the Legislature.

The old common law notion was, that a cause of action once vested can only be barred by a release or by accord and satisfaction.

But it is now settled that where there is an agreement between a debtor and his creditors that the latter shall receive a composition, such agreement although unexecuted so as not to amount in strictness to a satisfaction, may, if accepted in lieu of the original contract, be pleaded in answer thereto: *Good v. Cheesman*, 2 B. & Ad. 328; *Norman v. Thompson*, 4 Ex. 755; *Boyd v. Hind*, 1 H. & N. 938.

There are now, besides, the different forms of discharge provided by the Insolvent Act.

The Insolvent Act provides for at least three modes of discharge.

1. By a consent signed by the statutable majority of creditors.

2. By a deed of composition signed in like manner.

3. By the order of a Judge.

The difference between the first two is, that while the second involves a restoration of the estate to the insolvent the first may be made without composition of any kind.

The difference between these two and the third is, that

the latter may not only take effect without composition, but without the consent of any given majority of creditors : See *Shaw v. Massie*, 21 C. P. 266.

It is necessary to bear these distinctions in mind when referring to the different sections of the Act which appear to bear upon the matter in controversy now before us.

It is the duty of the insolvent, within ten days of the date of the assignment, &c., to furnish the assignee with a correct statement of all his liabilities, indicating the nature and amount thereof, together with the names, additions and residences of his creditors, and the securities held by them so far as known to him : Sec. 17.

It is the duty of the assignee, immediately after the assignment, to call a meeting of the creditors of the insolvent : Sec. 20.

Notice in writing of this meeting is to be mailed to every creditor mentioned in the original or any supplementary list or statement furnished by the insolvent, or who may be known to be a creditor : Sec. 21.

If at the first meeting, or at any time thereafter, the insolvent file with the assignee a consent in writing to his discharge, or to a deed of composition and discharge, signed by at least a majority in number of the creditors who have respectively proved claims of \$100 or upwards, or if at such first or any subsequent meeting an offer be made by the insolvent to compound with his creditors, specifying the terms and conditions of the proposed composition, and such offer be approved by a majority in number of the creditors present at such meeting, it is made the duty of the assignee to call another meeting of the creditors to take such consent or such deed or offer of composition and discharge into consideration : Sec. 49.

All questions discussed at meetings of creditors must be decided by the majority in number and value of the creditors having a right to vote, present or represented at such meeting, and representing also the majority in value of such creditors, unless in the Act otherwise specially provided : Sec. 102.

Creditors who have the right of voting at meetings as to the execution of a deed of composition and discharge, or the consent to a discharge of an insolvent, are persons, co-partnerships or companies whose unsecured claims to an amount of \$100 or upwards have been proved under the Act: Sec. 2, sub-sec. *h*.

The proportion of claims in value required to give validity to any such proceeding, is formed of all claims so proved, whether above or under \$100, and of no others: *Ib*.

But with respect to a deed of composition and discharge, or the consent to a discharge, no creditor whose claim is not affected by such discharge can be reckoned as one of the required number of creditors, nor can his claim be reckoned as forming part of the proportion of claims required to give effect to such composition and discharge: *Ib*.

The creditors present at the meeting to take into consideration the proposed discharge, or composition and discharge, may by resolution to that effect express their approval thereof, or dissent therefrom: Sec. 51.

It is made the duty of the assignee at the close of the meeting, or at any time thereafter, when the insolvent has obtained the assent to his discharge, or to the proposed composition and discharge, to annex to the deed or offer of composition and discharge a certificate to that effect, in which he shall state the total number and total amount of claims of \$100 and upwards which have been proved, the number of creditors who have given their written assent to the discharge, or to the proposed composition and discharge, and the amount of proved claims of \$100 and upwards, and other similar information: Sec. 52.

Provision is made for confirmation by the Court of the discharge thereby effected after notice by mail to each of the creditors: Secs. 53, 54, 55.

The insolvent is not entitled to a confirmation of his discharge if it appear:

1. That the insolvent has not obtained the assent of the proportion of his creditors in number and value required to grant such discharge, or enter into such deed of composition or discharge.

2. That the insolvent has been guilty of any fraud or fraudulent preference within the meaning of the Act, or of fraud or evil practice in procuring the consent of the creditors to the discharge, or their execution of the deed of composition and discharge, &c.

The Court may either confirm the discharge or order the suspension of the operation of the discharge for a period not exceeding five years, &c. : Sec. 57.

A deed of composition and discharge may be made either in consideration of a composition paid in cash or on terms of credit, or partially for cash and partially for credit. The payment of the composition may be secured or not according to the pleasure of the creditors. The discharge therein contained may be absolute upon the condition of the composition being satisfied : Sec. 59.

Whenever it appears that the estate of the insolvent has not paid or is not likely to realize for the creditors a dividend of thirty-three cents in the dollar on the unsecured claims, and sufficient account is not given of the deficiency the Court or a Judge may in its or his discretion suspend, or refuse altogether to discharge the insolvent : sec. 58 ; but there is nothing in the Act contained to prevent the creditors themselves granting a discharge in the case of a *composition* of only thirty cents in the dollar.

It is the duty of the assignee when certifying under sec. 52 of the Act to state in his certificate the ratio of *dividend* actually declared and likely to be realized out of the estate for the unsecured creditors.

So soon as the deed of composition and discharge is executed it is the duty of the assignee to re-convey the estate of the insolvent : Sec. 60.

If the deed of composition and discharge be contested, the Judge may suspend any payment or instalment of the *composition* falling due under the terms of the deed. *Id.*

The confirmation of the discharge absolutely frees and discharges the insolvent from all liabilities (except such as are hereinafter specially excepted) existing against him and proveable against his estate (whether secured or not).

which are shewn by any supplementary list of creditors furnished by the insolvent previous to his discharge and in time to admit of the creditors therein mentioned obtaining the same *dividend* as other creditors : Sec. 61.

A discharge under the Act is not to apply (without the express consent of the creditor) to any debt for the enforcing of payment of which the imprisonment of the debtor is permitted by the Act, but the creditor of any such debtor may accept a *dividend* thereon from the estate without being by reason thereof in any respect affected by any discharge obtained by the insolvent : Sec. 63.

If after the expiration of one year from the date of the assignment, &c., the insolvent has not obtained from the required proportion of his creditors a consent to his discharge or the execution of a deed of composition and discharge, he may apply to the Court or Judge for a discharge : Secs. 64, 65.

Provision is made for the assignee paying dividends : sec. 79 ; preparing a dividend sheet : Sec. 82 ; giving notices of dividend : Sec. 92 ; and for the contestation of dividends : Sec. 93 ; reserve of dividends : Secs. 94, 129 ; determination of claims to dividends when objected to : Secs. 95, 96 ; and disposition of unclaimed dividends : Sec. 98.

It will be observed that where the payment is under a deed of composition and discharge, it is, as in sec. 60, described as a payment or instalment of *composition*, but where it is out of the estate of the insolvent, it is described as a *dividend*.

It does not appear to me that these words as used in the Act, convey or were intended to convey the same meaning. "Composition" as ordinarily understood between debtor and creditor, means an arrangement mutually satisfactory for the discharge of debt on terms other than in the original contract, and generally to the disadvantage of the creditor. By "dividend" is ordinarily meant the proportionate part of a fund for the payment of creditors, where the debtor is at the time unable to pay all creditors in full.

If a creditor, with others, sign a deed of composition

containing a discharge, he is independently of statute, bound by it. If he accept a benefit under it, he is as much bound by the terms of the deed as if he had signed it: *Miller v. Aris*, 4 Esp. 231; *Sadler v. Jackson*, 15 Ves. 52; *Cheesebrough v. Wright*, 28 Beav. 283. See further, *Allan v. Garratt et al.*, 30 U. C. R., 165; *Mitchell v. Mitchell*, 27 C. P. 160. But whether he sign it or not, and whether he accept a benefit under it or not, he is bound by it under the statute, provided it be signed by the requisite number and value of creditors, and be in other respects in accordance with its provisions: *Dredge v. Watson*, 33 U. C. R. 165; *Preston v. Hunton*, 37 U. C. R. 177; *Campbell v. Im Thurn*, L. R. 1 C. P. D. 267; *Ex parte Lang*, 37 L. T. N. S. 449.

The discharge may be looked upon as the voluntary act of the creditor, independently of the statute, either where he himself signs the discharge, or where he accepts a benefit under the deed containing it, so as to be precluded from denying that he did sign it.

I cannot think that the Legislature intended by any language which they have used in the Insolvent Act, to make void a discharge where, independently of the statute, it ought to be looked upon as the voluntary act of the creditor for good consideration.

Words such as used at the end of sec. 63, authorizing the creditor of any such debt as now sued to claim and accept a *dividend* thereon *from the estate*, without being *by reason thereof* in any respect affected by the discharge obtained by the debtor, do not, in my opinion, apply to the case where there is a composition, and acceptance of composition in full by the creditor under the terms of the deed.

But conceding that the first part of sec. 63 does apply to this case, I am of opinion that these plaintiffs are by their conduct precluded from denying that the discharge was otherwise than with their "express consent."

The plaintiffs received the promissory notes made by the insolvent, and endorsed by his surety, as a composition

under a deed, which made their acceptance a release of all their claims against the insolvent, and not merely as a dividend out of the insolvent's estate, or payment on account of their demand against his estate.

If the plaintiffs, when accepting the composition notes, did not intend to receive them as they were given, it was their duty at the time to have returned the notes and rested on their statutable right to sue the insolvent for fraud, and under the pressure of such a suit to have attempted to have enforced payment in full of their demand.

The general rule is, that wherever there is an intention expressed by the payer that money or its equivalent is paid for a particular purpose, and the payee receives it under a different intention, it is the duty of the latter to give the former an opportunity to retract: See *Kitchen v. Hawkins*, L. R. 2 Q. B. 31.

There is nothing, I think, in the Insolvent Act to prevent the full operation of this wholesome rule in a case like the present.

The seventh plea, although containing many allegations which are unnecessary, in substance contains a good answer to the action, for it shews the acceptance by the plaintiffs of endorsed promissory notes under a composition deed, which makes their acceptance a discharge of the plaintiffs' demand.

The replication, which alleges that the plaintiffs did not expressly consent that the discharge in the plea referred to should apply to the debt as to which this action is brought, is, in my opinion, a bad replication to such a plea.

The rejoinder, which alleges "that the facts stated in the seventh plea are true," and then, in addition, avers a number of facts not stated in the plea, but not inconsistent therewith, and immaterial to the defence, is not, in my opinion, open to the objection that it is a departure from the plea.

The rejoinder does not the less support the plea because, in addition to a reiteration of the facts disclosed in the plea, it discloses other facts unnecessary to the defence, so

long as they are not inconsistent with the plea: See *Brine v. Great Western R. W. Co.*, 2 B. & S. 402; *Rixon v. Emary*, L. R. 3 C. P. 546; *Dickson v. Swansea Vale and Neath and Brecon Junction R. W. Co.*, L. R. 4 Q. B. 44; *Reiffenstein v. Hooper et al.*, 36 U. C. R. 295.

While the rejoinder makes a clumsy endeavour to defeat a worthless replication, it, I think, really, so far as it has any operation, maintains and supports the plea.

I am inclined to think that under an ordinary plea of accord and satisfaction the defendant, on the material facts admitted by the demurrer to the seventh plea and rejoinder to the replication to that plea, would have had a complete answer to the action; in other words, that the plea and rejoinder may be looked upon as pleading the evidence in support of a plea of accord and satisfaction.

The pleading of evidence, however improper or embarrassing, is not a ground of general demurrer.

In my opinion there should be judgment for the defendant on the demurrer to the seventh plea, on the exceptions to the second replication to the seventh plea, and on the demurrer to the rejoinder to the second replication to the seventh plea.

ARMOUR, J.—The broad question argued before us, and which we are asked to determine, although perhaps the pleadings do not quite appropriately present it, is whether the plaintiffs by their conduct with regard to their claim in the proceedings had under the defendant's insolvency, have precluded themselves either at law or in equity from enforcing their claim in this suit.

By section 17 of the Insolvent Act of 1875, the insolvent is required within seven days of the date of the assignment, or from the date of the service of the writ of attachment, or if the same be contested within seven days from the date of the judgment rejecting the petition to have it quashed, to furnish the assignee with a correct statement (form F.) of all his liabilities, direct or indirect, contingent or otherwise, indicating the *nature* and amount thereof,

together with the names, additions, and residences of his creditors, and the securities held by them in so far as may be known.

The insolvent is, by the same section, permitted to, at any time, correct or supplement the statement so made by him; and by section 23, the insolvent is required to attend at the first meeting of his creditors, and after making such corrections as he may deem proper to such statement to attest the same under oath, and he may at such meeting be examined under oath before the assignee, by or on behalf of any creditor touching his affairs.

By section 104, the claims of creditors furnished to the assignee in the Form P. attested under oath, and accompanied by the vouchers on which they are based, or, when vouchers cannot be produced, accompanied by such affidavit or other evidence as in the opinion of the assignee shall justify the absence of such vouchers, shall be considered as proved unless contested, in which case the claims shall be established by legal evidence on the points raised.

In the second clause of the form P., after the words: "The insolvent is indebted to me (or to the claimant) in the sum of dollars," is inserted this direction, (here state the *nature* and particulars of the claim, for which purpose reference may also be made to accounts or documents annexed). By sub-sec. *h.* of section 2, "the word 'creditor' shall mean every person, co-partnership, or company to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety; but in reference to proceedings at meetings in insolvency, to the right of voting, to the execution of a deed of composition and discharge, the consent to a discharge of an insolvent, or any other consent or action with regard to the management and disposal of the estate of an insolvent, the word 'creditor' shall mean a person, co-partnership, or company whose unsecured claims to an amount of one hundred dollars or upwards *have been* proved in the manner provided by this Act, and the proportion of claims in value required to give validity to any such proceeding or action shall be

formed of all claims so proved, whether above or under one hundred dollars, and of no others ; and with regard to any deed of composition and discharge, or the consent to a discharge of the insolvent, no creditor whose claim is not affected by such discharge shall be reckoned as one of the required number of creditors, nor shall his claim be reckoned as forming part of the proportion of claims required to give effect to such composition and discharge."

By sec. 52, it is provided that "if at the close of the meeting or at any time thereafter the insolvent has obtained the assent to his discharge, or to the proposed composition and discharge, of a majority in number of his creditors who have proved claims to the amount of one hundred dollars and upwards, and who represent at least three-fourths in value of all the claims of one hundred dollars and upwards which have been proved, the assignee shall annex to the deed or consent to a discharge, or to the deed or offer of composition and discharge, a certificate to that effect, in which he shall state the total number and total amount of claims of one hundred dollars and upwards which have been proved, the number of creditors who have given their written assent to the discharge or to the proposed composition and discharge of the insolvent, and the amount of proved claims of one hundred dollars and upwards which they represent. The assignee shall further annex to such certificate a copy of any resolution adopted at the meetings of creditors in reference to the discharge, or to the proposed composition and discharge, and all the objections which may have been filed with him to such discharge or composition and discharge, together with a certificate as to the amount of claims of the creditors who shall have agreed to or opposed such resolution, or who may have filed objections in writing to such discharge or proposed composition and discharge, indicating the amount of such claims of one hundred dollars and upwards which have been proved, and whether from their *nature* they will be affected by the proposed discharge or composition and discharge."

And by sec. 63 it is provided that debts to which a discharge under this Act does not apply, and any privileged debts, and the creditors thereof, shall not be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter, or thing under the Act.

It seems to me, from the provisions above quoted, that the term "nature" used in section 17 and in the direction contained in the form P, must be held to mean the particular character of the debt set forth, in such a manner as to inform the assignee and the creditors whether it is an ordinary debt or a privileged debt, or a debt of the nature or particular character of the debts mentioned in the 63rd section of the Act; in short, whether it is a debt which from its nature would or would not be affected by a discharge under the Act.

The assignee and the creditors must be informed whether it is such a debt as from its nature would or would not be affected by a discharge under the Act, or how otherwise are they to know whether the creditor, with regard to any deed of composition and discharge or the consent to a discharge of the insolvent, is to be "reckoned as one of the required number of creditors," or whether his claim is to be "reckoned as forming part of the proportion of claims required to give effect to such composition and discharge;" and how otherwise is it to be known whether the debt or the creditor thereof is to be "computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter, or thing under this Act;" and how otherwise is the assignee to be enabled to give the certificate to be annexed by him to the deed, or consent to a discharge, or to the deed or offer of composition and discharge with regard to the claims, "whether from their *nature* they will be affected by the proposed discharge or composition and discharge."

Such information in a case like the present could only be furnished by the insolvent and by the creditor, and I think that it is required by the Act to be furnished under the

term "nature," by the insolvent, if he admits it to be such a debt, in his statement of liabilities; and by the creditor, if he claims it to be such a debt, in the proof of his claim.

The insolvent set down in the statement of his liabilities the plaintiffs' claim as an ordinary debt, and not as a debt which from its nature would not be affected by a discharge under the Act. He attested such statement under oath, and he pleads that he believed that the plaintiffs' claim was an ordinary debt.

It was entirely at the plaintiffs' option whether they would prove their claim as an ordinary debt, or whether they would prove it as a debt which from its nature would not be affected by a discharge under the Act. They chose to prove it as an ordinary debt, and I do not think that they can complain if they are now held to the election they then made with regard to it.

Assuming, however, that they were not bound in their proof of claim to shew that their claim was a debt which, from its nature, would not be affected by a discharge under the Act, they were still, I think, bound in equity to communicate the fact that they so regarded it to the insolvent, the assignee, and the other creditors.

The classes of cases referred to in the judgment appealed from, in which silence is held not to be fraud, are not, in my opinion, applicable to the case in hand, but that that class of cases is the rather applicable, determined by Courts of equity in relation to compromises.

In proceedings in insolvency, there should, in my opinion, be the most perfect good faith exhibited, not only by the insolvent towards the creditors, and by the creditors towards the insolvent, but by each creditor towards every other creditor: each creditor should fully and fairly communicate and disclose every material circumstance respecting his claim.

In the proceedings in the defendant's insolvency the plaintiffs were aware that the insolvent, the assignee, and the other creditors were under the belief that theirs was an ordinary debt; they were aware that such of the credi-

tors as agreed to the deed of composition and discharge were so agreeing under the same belief; they knew that the defendant and his sureties were becoming bound in that deed under the like belief; and they knew that the fact, if such it was, that their claim was a debt which from its nature would not be affected by the proposed discharge, was one material to be known by the assignee, the other creditors, the insolvent and his sureties, and they chose to refrain from communicating it to them. They kept silent with regard to it, and profited by their silence in receiving the composition notes, which, but for such silence, it is to be presumed they never would have received.

Such being their conduct, they are, in my opinion, precluded by it from enforcing their claim in this suit. Silence is no longer profitable to them, and they now desire to speak, but "they were silent when in conscience they ought to have spoken, and they are now debarred in equity from speaking when conscience requires them to be silent." See *Kerr on Fraud*, Am. ed., p. 127; *Daughlish v. Tennent*, L. R. 2 Q. B. 49; *Mitchell v. Mitchell*, 27 C. P. 160; *Campbell v. Im Thurn*, L. R. 1 C. P. D. 267; *Ex parte Lopez*, *Re Lopez*, L. R. 5 Ch. D. 65.

Judgment for plaintiffs on exceptions to the declaration, and for defendant on demurrer to the rejoinder.

WILSON, J., adhered to his previous decision.

Judgment accordingly.

WILLIAM ROBINSON, JR., v. THOMAS FEE, WILLIAM FEE,
AND OWEN DEAN.

Tenancy of land—License—Right to maintain trespass.

The plaintiff's father owning certain land mortgaged it to A., who filed a bill for foreclosure or sale. The mortgagor soon after the filing of the bill conveyed his equity of redemption to the plaintiff for a consideration expressed of \$500, but he continued on the land with the plaintiff. The land was sold under a decree of the Court to the plaintiff, who failed to pay, and afterwards the land was conveyed to F., the highest bidder, who the plaintiff swore purchased as trustee for the plaintiff. The plaintiff afterwards released his interest to S., who conveyed to defendant F. Some negotiations, set out in the case, took place between the plaintiff and F. in May, and the plaintiff put in and harvested crops, which defendant D. seized, acting under a writ of possession issued from the Court of Chancery in the foreclosure suit, and assisted by F. and others.

Held, that upon the evidence set out in the report there was no demise by will or otherwise to the plaintiff, but a mere license, determined by failure of the negotiations, and under which the plaintiff acquired no interest in the land or crops, which would entitle him to maintain trespass, though he might be entitled to be paid for his work upon the land while the license continued.

FIRST count: trespass *quare clausum fregit* to the south half of lot 16 in the 11th concession of Manvers.

Second count: trespass *quare domum fregit*.

Third count: trespass *de bonis*.

Fourth count: trespass for the same goods.

Pleas by Owen Dean :—

1. Not guilty.
2. To first count: land not plaintiff's.
3. To first count: *liberum tenementum* in Thomas Fee.
4. To second count: dwelling house not plaintiff's.
5. To second count: *liberum tenementum*.
6. To first and second counts: justification under a writ from the Court of Chancery.

Pleas by Thomas Fee and William Fee :—

1. Not guilty.
2. To first count: land not plaintiff's.
3. To first count: *liberum tenementum* in Thomas Fee.
4. To first count: *liberum tenementum* in Horace Aylwin.

5. To second count: dwelling house not plaintiff's.

6. To second count: *liberum tenementum* in Thomas Fee.

7. To second count: *liberum tenementum* in Horace Aylwin.

8. To second count: *liberum tenementum*.

9. To third and fourth counts: goods not plaintiff's.

10. To third and fourth counts: justification under a writ from the Court of Chancery.

Replication as to pleas of Dean:—

1. Issue.

2. To sixth plea: plaintiff no party to the Chancery suit.

3. To sixth plea: that mortgagor at the time of the issuing of the Chancery writ was not in possession.

4. To sixth plea: plaintiff a tenant to Thomas Fee.

Replications as to pleas of Thomas and William Fee, similar to the foregoing.

Rejoinder, issue and denial of the tenancy under Thomas Fee.

Surrejoinder, issue.

Added replication to the second, third, fourth, fifth, and sixth pleas of the defendant Dean, tenancy of the plaintiff under Thomas Fee.

Added replication to the first and second pleas of the defendants Fee to the first count, and to the first, second, and fourth pleas of the defendants Fee to the first and second counts of the declaration, tenancy of the plaintiff under Thomas Fee.

Rejoinder by all the defendants to added replications. Issue.

The cause was tried at the last spring Assizes at Cobourg, before Burton, J. A., with a jury.

The Rev. William Robinson, father of the plaintiff, at one time owned the south half of lot 16 in the 11th concession of Manvers.

While the owner of the land he mortgaged it to Horace Aylwin.

Default was made in the payment of the mortgage, and

Horace Alwyn filed a bill in Chancery for foreclosure or sale.

Shortly after the filing of the bill, but before sale of the land, the mortgagor conveyed his equity of redemption to the plaintiff for a consideration, expressed in the deed, of \$500.

Notwithstanding the deed the mortgagor continued to reside on the land with his son, the plaintiff.

The land was sold under a decree of the Court of Chancery to the plaintiff, but he made default in the payment of the purchase money, and afterwards the land was by the Court conveyed to Charles Smith who made the highest tender for it.

It was contended by the plaintiff that Smith purchased as a trustee for him, and the plaintiff swore to that effect at the trial.

The plaintiff afterwards executed a release of his interest in the land to Charles Smith.

Charles Smith thereupon conveyed the land to the defendant Thomas Fee.

The plaintiff contended that Fee purchased from Smith with notice of some claim which the plaintiff pretended to have to the land, and threatened to file a bill against him in the Court of Chancery for the recovery of the land.

Fee, then, according to the testimony of the plaintiff, sometime in May, said, "William, there is no use in going to law about that at all, I would be willing to make terms." The plaintiff answered, "I would be willing to make terms too, and do anything that is fair or square in the matter." Fee then said, "I bought this place from Mr. Smith at \$4,400, and I have a mortgage on it for \$3,500; now, if you pay me \$300 over and above that amount, I will give you the place up. These \$300 I claim your brother owes me and I want them." Plaintiff said, "I will pay you that on account of my father's name being on that property if you give me time." Fee said, "That leaves me \$900 of my own private money out to Mr. Smith, and if you pay me that \$900 at the first of January, I will give you time for the

\$300 and take such security as you can give me, either your own notes or a second mortgage." Plaintiff agreed.

Next day or a day or two afterwards, the parties went to Lindsay to have the writings prepared, when Fee wanted plaintiff to accept a lease, as this would be his only security, but the plaintiff, until he could see his lawyer, objected, and the parties separated.

After leaving the lawyer's office, when parting, plaintiff said, "If this going under a lease does not interfere with my bargain, I have no objection to going under a lease. As soon as I get word from my lawyer, I will go back again. And this money that is to go into the lease that is to be part of the \$900 that I am to pay you the first of January, is not that the way I understand you." Fee said, "Yes." Plaintiff said, "When I pay you that \$900 at the first of January, you are to give me time for the \$300, my brother owes you." Fee said, "Yes, I will." Plaintiff said, "Well, I will go on with my work in the meantime, and when I get word I will go back." Plaintiff said, "It is pretty well on now in May and a good many people are nearly done sowing." Fee said, "I will send you a team if you like."

Plaintiff when he got back to the farm, at once went to work making some preparations to sow the land.

A few days subsequently, the parties again met in the lawyer's office in Lindsay. Fee then said, "You will have to give me \$300 for the use of this place up to the first of January." Plaintiff said, "It is not worth \$200 let alone \$300; but I do not care what you put on it so long as I am getting the place." Then Fee wanted the plaintiff to pay the \$300 cash or else pay him \$175 more than the \$300 if time were given. Plaintiff refused to accept these terms, went home, continued his preparations for sowing, and put in his crops.

Some time afterwards plaintiff saw Fee and said, "I have got a chance of getting that money sooner than I arranged to give it to you, and sooner than you arranged to get it, and if you have no objection I would just as soon pay it

now and be done with it as to wait to January." Fee said, "All right, all I want is my money. Bring it down, and we will settle the thing up."

Fee then said he was going to Oswego and Albany and would be eight or ten days away, but promised to write, naming a day for plaintiff and the person from whom plaintiff said he was getting the money to meet him.

Before the expiration of the eight days, plaintiff cut and harvested his barley. He also cut his wheat, and put it in the barn.

Afterwards without any such letter having been sent to the plaintiff and without Fee again seeing the plaintiff, defendant Dean acting as a sheriff's officer, assisted by the defendant William Fee and others, turned the plaintiff out of possession of the land and took possession of the crops.

Defendant Dean acted under a writ of possession from the Court of Chancery issued in the suit for the foreclosure of the mortgage.

Counsel for the defence at the close of the plaintiff's case, moved for a nonsuit, on the ground that the evidence established that the plaintiff before action had conveyed any interest he had in the land to Smith, through whom the defendants claim : and that what occurred subsequently did not establish a tenancy at will, or any other agreement which would entitle the plaintiff to maintain trespass.

The learned Judge was of that opinion, and nonsuited the plaintiff.

The writ of assistance from the Court of Chancery was dated on the 23rd of August, 1876. It recited an order of the Court of Chancery, dated the 10th of August, 1876, made in the suit of *Alwyn v. The Rev. William Robinson*, for the delivery of the possession of the land by the defendant to Thomas Fee, the refusal of the defendant to comply with the order, and authorized the sheriff of the united counties of Northumberland and Durham, to whom the writ was directed, "to put the said Thomas Fee or his assigns without delay into the full, peaceable and quiet possession of all and singular the said lands and

premises, with their appurtenances, and from time to time, as often as there shall or may be occasion, to maintain or keep him and his assigns in such peaceable and quiet possession, according to the intent and true meaning of the said order."

It then commanded and enjoined the sheriff, "immediately after your receipt of this writ, you do go and repair to, and enter into and upon the said land and premises; and that you do remove, eject and expel the said the Rev. William Robinson, his tenants, servants, and accomplices, each and every of them, out of and from the said land and premises, and every part and parcel thereof, and that you do put and place the said Thomas Fee and his assigns into the full, peaceable, and quiet possession thereof, and defend and keep him and his said assigns in such peaceable and quiet possession when and as often as any interruption may or shall from time to time be given or offered to him, them, or any of them, according to the true intent and meaning of the said order."

Annexed to the writ was an affidavit of Dean, dated on the 2nd of October, 1876, in which he deposed that he did, on Monday, the 2nd of October, 1876, personally serve the Rev. William Robinson with a copy of the writ, and did at the time of such service exhibit to him the thereto annexed original writ of assistance.

The seizure of which the plaintiff complained was made on the 28th of August, 1876. According to his evidence his barley, wheat, and oats were cut and then in the barn. The barn was locked by the defendants, who refused to allow him access, and his potatoes were dug and carted away by the defendants.

During Easter term last, May 23, 1877, *John W. Kerr* obtained a rule calling on the defendants to shew cause why the nonsuit should not be set aside, and for a new trial, on the ground of the erroneous ruling of the learned Judge in deciding that there was no evidence to go to the jury on any count of the declaration, and in ordering

a nonsuit while there was evidence on all, and particularly on the third and fourth counts of the declaration, which should have been left to the jury, and on the ground that the nonsuit was contrary to law and evidence.

During last term, November 27, 1877, *Armour*, Q. C., shewed cause. Under the writ from the Court of Chancery the plaintiff was properly expelled from the land: *Johnston v. McKenna*, 3 P. R. 229; and the taking possession of the plaintiff's crops was not, under the circumstances, a conversion: *Thorogood v. Robinson*, 6 Q. B. 769. The plaintiff conveyed whatever interest he had in the land to Smith, under whom defendant Thomas Fee claimed; and the subsequent negotiations between the plaintiff and Thomas Fee afforded no evidence of a tenancy at will: *Doe Richardson v. Dafoe*, 4 U. C. R. 484; *Daniels v. Davison*, 16 Ves. 249. Plaintiff was not, under the circumstances, entitled to a demand of possession: *Robertson v. Slattery*, 10 U. C. R. 498; *Robinson v. Smith*, 17 U. C. R. 213. The crops were raised on land belonging to the defendant Thomas Fee, and Fee was entitled to them as being the owner of the land: *Davis v. Connop*, 1 Price 53; *Burrows v. Cairns*, 2 U. C. R. 288; *Caldecott v. Smythies*, 7 C. & P. 808; *Hodgsons v. Gascoigne*, 5 B. & Al. 88; *Doe d. Upton v. Witherwick*, 3 Bing. 11; *Cole on Ejemctent*, 356.

John W. Kerr, contra. The plaintiff, with the assent of Thomas Fee, put in the crops. This was enough to create a tenancy at will. The writ from the Court of Chancery could give no authority for the expulsion of the plaintiff, who was no party to the suit. Upon the termination of the tenancy at will by Thomas Fee, the plaintiff was entitled to his crops as emblements. Even if the plaintiff was a mere licensee, he would be entitled to a reasonable time for the removal of his crops after the termination of his license: *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 405; *Gibboney v. Gibboney*, 36 U. C. R. 236; *Keys v. Guy*, Ib. 356. There was, under any circumstances, a case for the jury: *Kingsbury v. Collins*, 4 Bing. 207; *Woodfall's L. & T.*, 10th ed., 586.

February 4, 1878. WILSON, J.—When the sheriff executes a writ of possession the growing crops pass with the land to the person who gets possession: *Hodgsons v. Gascoigne*, 5 B. & Al. 88.

So crops grown on the land of which possession is given, and severed since the day of demise laid in the declaration, or since the time the plaintiff's title has accrued, and still upon the land at the time of the *hab. fac. poss.* executed, may, it seems, also be delivered to the plaintiff with the land: *Ibid*; and *Doe d. Upton v. Witherwick*, 3 Bing. 11.

But if the plaintiff's property, as chalk taken from the soil, has been burned, by the defendant in ejectment, into lime so as to change the right of property in the article, the plaintiff cannot take possession of the article in its new and altered state: *Thorogood v. Robinson*, 6 Q. B. 769.

I presume there can be no doubt that if the defendant have wrongfully cut timber on the land, which is lying there when possession is given by the sheriff to the plaintiff, the cut timber so upon the land must pass to the plaintiff as owner of the land, either by the delivery of the land to him, or as an incident to or of his ownership of the land and as incident to the land. There would seem then to be no doubt that the plaintiff was entitled to the crops in question, if the plaintiff is held to be a privy in estate or interest with the persons or with any of them who were parties to the suit in Chancery, in which the writ of assistance in question was issued; and if the crops which were taken under the writ were severed from the land after the time when, by the course of proceedings in that suit, the defendants in that suit, and all who claimed from or under them or any of them, are to be considered as wrong doers.

The writ of assistance recites that, by an order of the Court dated the 10th of June, 1876, the Rev. William Robinson was directed to deliver possession of the land in question to Thomas Fee, or to whom he might appoint, within fourteen days after the service of the said order upon him. Yet, that he and other ill-disposed persons his accomplices had refused to pay obedience thereto, and had

kept and still kept possession of the land in contempt of the Court. The writ does not shew when that order was served so as to make it obligatory to give up the possession in accordance with it—and so as to constitute those resisting the order wrong-doers, in respect of longer withholding the possession of the land.

That may have been before the severance of the crops which are now in question, and if so it may be the defendants in this action were justified in taking the crops which the plaintiff now claims.

I think the defendants would be justified in such seizure, without considering at present the plaintiff's assertion of right of possession by reason of the alleged bargain between him and Fee, because the plaintiff had a title from his father, the original owner and mortgagor of the land, and he claimed the right which Smith, the purchaser in the Chancery suit, had got, the plaintiff alleging that Smith had bought as his trustee, and so he was in privity with his father the mortgagor, and liable to be dispossessed along with his father.

It is said very broadly in *Doe d. Upton v. Wells*, 1 Leon. 145, that the sheriff in executing a writ of possession should remove from it all persons on the premises.

In 1 *Rolls's Abr. Execution H*; 2 *Watson's Sheriff* 318, that the sheriff should remove the defendant, and the several tenants in possession and their families and servants and their goods. That is far enough for the purposes of this case. See also *Doe v. Harlow et al.*, 12 A. & E. 40, 42, note (*d.*)

If the service of the order of the Court were not made till after the severance of the crops, I am rather inclined to think the plaintiff who put them in and reaped them was entitled to them.

There is, however, another branch of the case, apart altogether from the matters just mentioned, which has to be considered.

The plaintiff asserts that the writ of assistance was wrongly executed so far as he was concerned, because he

was not an "ill-disposed person, the accomplice" of the Rev. Wm. Robinson, and that he did not "refuse to pay obedience to the said order of the Court," nor did he "detain and keep possession of the land in contempt of her Majesty or of the said Court;" but that he had a special bargain with Thomas Fee, who sued out the writ of assistance, by which he was rightfully in possession of the land as tenant at will to Thomas Fee, or as tenant to him up to the 1st of January, 1877, and that the crops which were taken by Fee were wrongfully taken by him, because they were the absolute goods and property of the plaintiff.

That part of the case, which is the most important part of it, depends altogether upon the evidence which was given at the trial.

The learned Judge thought that no case was made by the plaintiff, and nonsuited him; and the question is, whether that nonsuit was right or not.

The facts appear to be, that the Rev. William Robinson, the father of the plaintiff, was at one time owner of the land in fee. He mortgaged it to Horace Aylwin. A foreclosure suit was commenced in Chancery on that mortgage against William Robinson. In the Master's office seven other persons were made defendants, including Robert Charles Smith and Thomas Fee.

William Robinson, the father, about three years before the trial had given the land to his son, the plaintiff, for \$800, and had given him a deed of it about two years after he says he had given him the place.

After the place was given to the plaintiff, and, as I assume, before he got a deed of it, he allowed his father to give a mortgage upon it to Smith for \$325, and mortgages also to others. There were charges upon the land to the amount of about \$3,000 when the plaintiff got his deed.

At the Chancery sale the plaintiff bid for the land, and it was knocked down to him for \$5,050. He was not able to complete the sale, and Smith made an offer to the Court of about \$3,800 for the place, and it was accepted.

The plaintiff alleged the purchase was made by Smith

for him, and that he was to have the place for the sum which Smith had tendered for it. And while he was trying to raise the money to pay Smith, Fee, he says, interfered and bought the land from Smith.

Fee then told the plaintiff and his father he had bought the land from Smith, and he forbid them doing anything with the land; and he wanted to get possession. The plaintiff refused to leave the place, and threatened to file a bill in Chancery to compel Fee to give up his purchase from Smith because of the plaintiff's bargain with Smith about the place.

In the same day, that was about the first of May, 1876. Fee then said to the plaintiff, "William, there is no use going to law about that at all, I would be willing to make terms." Plaintiff said, "I would be willing to make terms too and do anything that is fair or square in the matter." Fee said, "I bought this place from Mr. Smith at \$4,400, and I have a mortgage on it for \$3,500; now, if you pay me \$300 over and above that amount, I will give you the place up. The \$300 I claim your property owes me and I want them." Plaintiff said, "Well, I will pay you that on account of my father's name being on that property, if you give me time." Fee said, "That leaves me \$900 of my own private money out to Mr. Smith, and if you pay me that \$900 at the first of January, I will give you time for the \$300, and take such security as you can give me, either your own notes or a second mortgage." Plaintiff said, "I will do that." Fee said, "Come down to morrow or next day and we will have the writings drawn." The plaintiff was to assume the mortgage Fee had given to Smith for \$3,500 as I understand.

So far the terms of the bargain were arranged, but the contract was to be put into writing.

A day or two after that conversation, the parties met at Lindsay, and they went to the lawyer's office to get the writings drawn. Fee then wanted the plaintiff to rent the place; plaintiff refused till he consulted his lawyer, as that was not the bargain.

The parties, Fee, the plaintiff, and his father, left the office; when on the sidewalk, before they parted, the plaintiff said to Fee, "If this going under a lease" (a written lease he explains) "does not interfere with my bargain, I have no objection to going under a lease. As soon as I get word from my lawyer, I will go back again, and this money that is to go into the lease is to be part of the \$900 that I am to pay you the first of January. Is not that the way I understand you?" Fee said, "Yes." Plaintiff said, "When I pay you that \$900 at the first January, you are to give me time for the \$300 my brother owes you." Fee said, "Yes, I will." Plaintiff said, "Well, I will go on with my work in the meantime, and when I get word I will go back." Plaintiff said, "It is pretty well on now in May, and a good many people are nearly done sowing." Fee said, "I will send you a team if you like."

The parties then separated, and so far there was no conclusive bargain, because the plaintiff had not then assented to what Fee wanted, but was to write to his lawyer, Mr. Kerr, of Cobourg, for his advice.

The same week the plaintiff, having heard from his lawyer, went with his father to Lindsay again, and there they saw Fee. They went again to the office of Mr. Martin, the lawyer, to draw the writings. The parties there differed about the terms. Fee wanted \$300 down for the use of the place to the first of January; or, \$175 extra if he waited till the first of January before he got any money paid to him. The plaintiff wanted to pay \$900 on the first of January, including the \$300 which Fee wanted down; and as they could not agree, the parties separated. The plaintiff went home, and went on with his work, and put in his crop.

On that statement, I think no bargain was made about anything, either as to the occupation or purchase of the land.

It must be stated that after Smith bought the land the plaintiff gave a release of his interest in it to Smith. The plaintiff, however, still relied on Smith giving him the land for what Smith had bought it for.

On page nine of the evidence the plaintiff said, as they all left Mr. Martin's office the first time they went about the writings, and when the plaintiff refused to take a lease until he had consulted his lawyer, that when he (the plaintiff) complained to Fee of the season being late to put in a crop, Fee answered, "Go on with your work, and I will send you a team a while to help you, if you like." I replied that I would make a bee.

That does not differ from what the plaintiff had already said on page two of the evidence, that he would go on with his work "in the meantime," that is, until he heard from his lawyer.

On page ten of the evidence the plaintiff said: "There was nothing said on the first day about the lease. I was to have possession from that day to the 1st of January, and the use of the place. That bargain was never varied. The reason I did not fix the fences earlier in the spring was, that the thing was pending, and I did not want to fix them or do anything to the place unless I had a bargain with Mr. Fee."

He also said that Fee "wanted me, at Mr. Martin's office, to go under a lease without any agreement of purchase. I was willing that day to enter into writings to carry out the agreement I had made a day or two before."

The effect of it all is, that the plaintiff and Fee did make a verbal agreement in the terms mentioned by the plaintiff on the 1st of May, by which the plaintiff was to have the place for \$4,400, that is, for \$900 more than the mortgage of \$3,500 lately put upon it, and a sum of \$300 further for a debt which the plaintiff's brother owed to Fee.

The plaintiff was to assume the mortgage of \$3,500, and to pay Fee the \$900 on the 1st of January then next following, and the other \$300 at a later day; and the plaintiff was to have the possession of the place until the 1st of January, and these terms were to be reduced into writing the next day. That verbal bargain the plaintiff never varied, but Fee wanted to vary it, and because the plaintiff did not assent to the variation, and because also,

as I gather from the evidence, there was no provision made for the plaintiff's purchase of the farm, he refused to execute the writing which Fee required, and the bargain broke off.

It never was a perfected bargain, because it was to be put into writing, and that was never done.

I think there was not at any time a demise by will or otherwise, but a mere parol bargain for one, which was to be reduced to writing: *Jones v. Reynolds*, 1 Q. B. 506; and that the right to occupy and to work in the meantime—that is until the writings were completed—created no term or tenancy, but was a mere license, determinable on the event of the negotiation between the parties, and which was determined by the failure of that negotiation.

The plaintiff may be entitled to be paid for his work labour, services, and outlay made on the land while that license continued; but he acquired no interest in the land or in the crops: *Pulbrook v. Larves*, L. R. 1 Q. B. D. 284.

I am obliged to say that in law the plaintiff cannot sustain this action, and that his rule should be discharged.

HARRISON, C. J., concurred.

ARMOUR, J., having been counsel in the case, took no part in the judgment.

Rule discharged.

REGINA V. MRS. PHILIP WILLIAMS.

Married woman—Conviction of—Sale of liquor—37 Vic. ch. 32 s. 35.

Where the husband, the occupant of the house in which the sale took place, was in gaol: *Held* that his wife might be convicted under 37 Vic. ch. 32 sec. 35, O., for selling liquor there without license.

On the 8th day of January, 1878, Mrs. Philip Williams was convicted, *eo nomine*, before the police magistrate in the city of Toronto, for that "she, the said Mrs. Philip Williams, did on the 11th day of December, 1877, at and in the said city of Toronto, in the county of York, unlawfully sell intoxicating liquor without the license therefor by law required."

Blackstock, on the part of the defendant, obtained an order for the removal into this Court by *certiorari*, of the conviction and evidence, whereby it appeared that Mrs. Philip Williams, so convicted, was the wife of one Philip Williams, who, and not the wife, was the occupant of the premises upon which the sale took place, but that the wife was convicted under the 35th section of 37 Vic. ch. 32, O., as being the person who in fact sold the liquor and received payment therefor.

Upon this return being filed, *Blackstock* obtained a rule calling upon the police magistrate to shew cause why the conviction should not be quashed, for the following reasons: 1. That the accused, not being the occupant of the house in which the illegal sale took place, is not liable to the penalties of the Liquor Acts. 2. That the accused being a married woman, living with her husband, the sale must be presumed to have taken place with the authority and by the direction of her husband, and was therefore his sale, for which he alone is liable. 3. That the accused being a married woman, living with her husband, the sale must be presumed to have taken place through the compulsion of the husband, and that she is, therefore, free from all liability in respect of such sale.

Upon the return of the rule, January 9, 1878, *Blackstock* supported his rule, and no cause was shewn. But on the day on which judgment was given, *Fenton*, County Attorney, appeared and stated that the husband was, when the sale took place, and was still, in gaol, undergoing sentence for a similar offence. This was admitted.

February 5, 1878. GWYNNE, J.—As far back as the 13th year of Geo. II. it was decided in *Rex v. Crofts*, 2 Stra. 1120, that a married woman may be convicted for selling liquor without a license. This is quoted as law in the text books at the present day: *Paley* on Convictions, 5th ed., 71; and 1 *Russ.* on Crimes, 3rd ed., 20. Then, again, the principle that a wife is exempt from liability in certain criminal acts, upon the ground of coercion on the part of her husband, does not apply where the wife has committed the offence by her husband's order or procurement if she committed it in his absence; in such a case no presumption arises that she acted by coercion of her husband, and the presumption, when it does arise, is removable by proof that the wife was the more active party, even when the offence was committed in the presence of her husband: 1 *Russ.* on Crimes, 3rd ed., 20, 21; and cases *ibi*.

In this case I have nothing to lead me to conclude that the offence charged was committed in the presence of the husband; if it was, I am certainly of opinion that there should be but one person convicted for the act of selling. There is nothing then appearing in this case which would, as it appears to me, exempt the wife from conviction under the 35th section of 37 Vic. ch. 32, if that section stood alone, she having actually sold the liquor and received the pay; but it is contended the effect of the 52nd section, as amended by the 25th section of 40 Vic. ch. 18, is to make the *occupant* of the house, where the sale takes place, the *only person liable to conviction at all* under the Act. And that, as it appears and is found that she was not the occupant, but that her husband was, she cannot be convicted.

The 52nd section of 37 Vic., as amended by 40 Vic. ch. 18,

reads as follows—as applicable to this case, omitting extraneous parts of the section:—"The occupant of any house, shop, or other place, in which any sale has taken place, shall be personally liable to the penalty and punishment prescribed in the 35th section, notwithstanding such sale be made by some other person who cannot be proved to have so acted under or by direction of such occupant, and proof of the fact of such sale by any person in the employ of such occupant, or who is suffered to be or remain in or upon the premises, or to act in any way for such occupant, shall be conclusive evidence that such sale took place with the authority and by the direction of such occupant."

Now, if this section had not been passed, the general rule of law applicable, if the owner of the house where the liquor was sold was the person prosecuted for the offence, would be that, although no one can be made criminally responsible for the acts of third persons, yet the employment of an agent in the defendant's usual course of business is sufficient evidence in such cases whence the magistrate might, if he thinks fit, presume that such agent was authorized to do the prohibited act with which it is sought to charge the principal—See *Paley on Convictions*, 5th ed., 72, and cases *ibi*.—so that a conviction against a husband or master for the sale of liquor contrary to law might have been sustained upon evidence to the satisfaction of the convicting magistrate that the wife or servant, who actually sold and delivered the liquor, was acting in the discharge of the defendant's usual course of business; but if the evidence should fall short of satisfying the magistrate's mind upon that point, the wife or servant, who actually sold, would be liable to conviction for the act of sale contrary to law.

Now the 52nd section of 37 Vic., as amended by 40 Vic. ch. 18, seems to me to make merely that to be conclusive evidence against the occupant which would have been sufficient evidence without the section, if it satisfied the mind of the magistrate that the sale took place in the ordinary course in which the defendant carried on his business, with this addition, that the occupant shall be con-

clusively bound by the acts, not only of all persons in his employment, but even by the wrongful acts of persons upon his premises, whom he suffers to be or remain there.

I do not think that this section, so amended, exempts a wife or servant, who commits the act of selling contrary to law, for which they would have been liable if this section had not been in the Act. At the same time, inasmuch as the Act does not seem to authorize two convictions for the same offence, namely, one against the person actually selling, as in this case the wife, and another against the husband, the occupant of the premises, upon the same evidence, it is plain that where the husband can be reached he alone should be the person proceeded against. If he were absent altogether from home at the time of the offence being committed, as, for example, if he were undergoing punishment for a similar or any offence, then it seems to me proceedings may be taken against the wife, if the act of selling was, as here, committed by her ; or if there was any difficulty in determining who, in any case, was really the occupant of the premises where the offence was committed, there surely should be no difficulty as to convicting the person actually committing the prohibited act, although a married woman. In such a case the reason for sustaining her conviction would be as strong as those which governed the Court in *Rex v. Crofts*, 2 Stra 1120.

It being admitted before me that the offence, for which this conviction took place, was committed by the wife while the husband was in gaol for a similar offence, the conviction must be upheld.

Rule discharged.

CHURCHER AND EMERY V. BATES AND PATRICK.

Assessment—Erroneous description of land—Invalid sale—Compensation for improvements—33 Vic. c. 23, s. 9, O.

Certain land was assessed, advertised for sale, described in the warrant, and sold at a tax sale, and conveyed, as part of lot 8—it being in fact part of lot 5. The treasurer, who conducted the sale, described the locality of the land intended to be sold, and the taxes were due on it.

Held, a case within 33 Vic. ch. 23, sec. 9, O., where land having been legally liable to be assessed, had been sold as for arrears of taxes, and such sale, &c., was invalid by reason of uncertain or insufficient description of the land; and that the purchaser was therefore entitled to his purchase money and interest and the value of his improvements, &c.

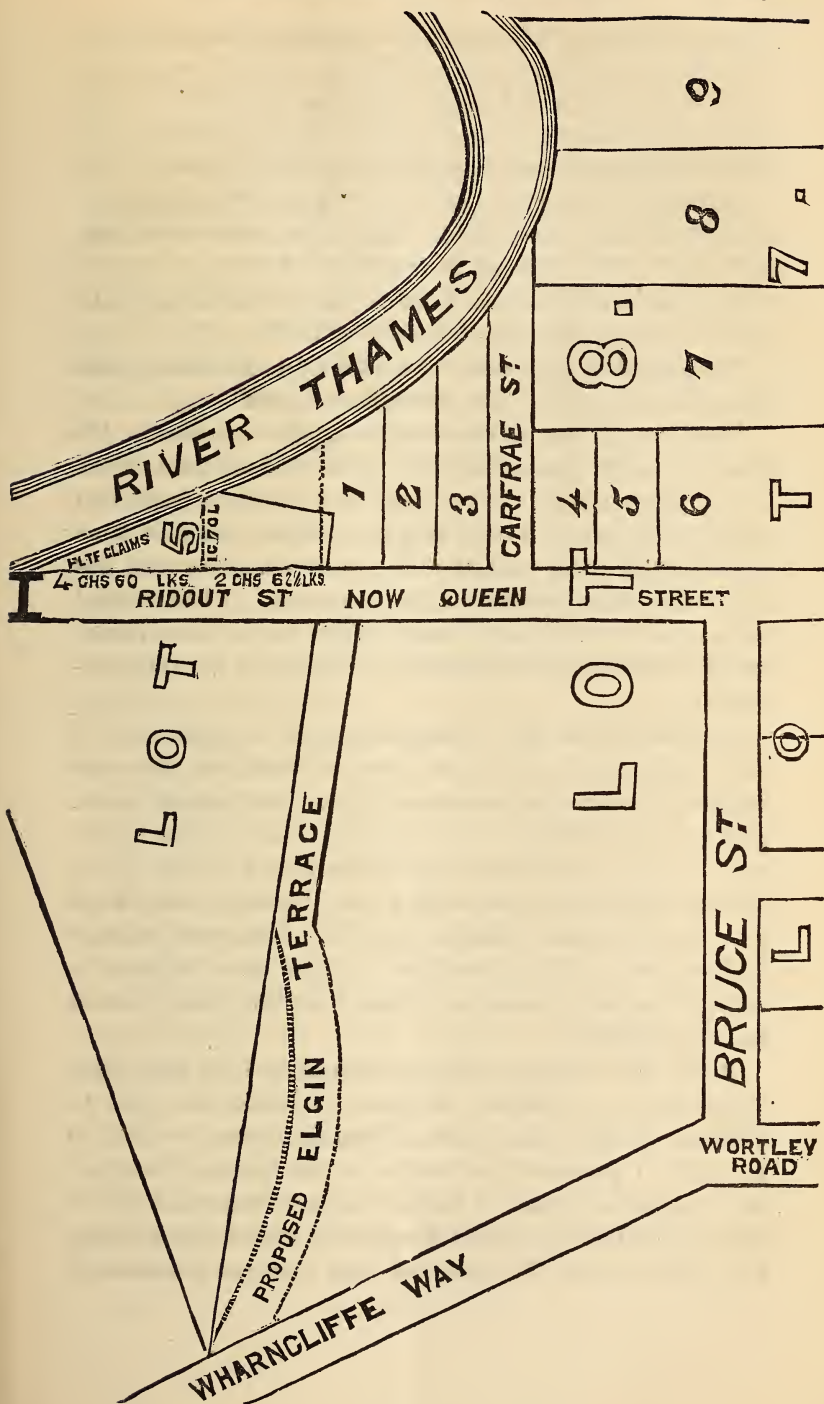
EJECTMENT for the north half of an acre lot conveyed to Henry Hume by the late James Givins, and being part of lot number five east on the Wharnccliffe highway, in the township of Westminster, described as follows: commencing on the easterly limit of the continuation of Ridout street, in the city of London, and two chains and sixty-two and a half links northerly from the southern limit of said lot number five, thence northerly seventy degrees thirty minutes east one chain seventy-one links, more or less, to the waters' edge of the river Thames; thence along the waters' edge of the said river in a north-westerly direction four chains ninety-four links, more or less to the easterly limit of the continuation of Ridout street; thence southerly along said limit four chains sixty links, more or less, to the place of beginning.

[*See plan on opposite page.*]

The plaintiffs claimed title by deed from John Bell to the plaintiff Emery, and by deed from Emery to his co-plaintiff Churcher,

The defendants claimed by deed dated 16th March, 1870, from the warden and treasurer of the county of Middlesex, to William Patrick, one of the defendants, for arrears of taxes.

The defendants claimed a lien for improvements as follows: That after such conveyance William Patrick improved the land by building dwelling houses and outbuildings, and by erecting and repairing breakwaters and other improvements of a lasting and permanent description, and he has paid taxes on the land, and that he, as purchaser, and Bates,



his co-defendant, as his tenant, are entitled to the possession of the land until the defendant William Patrick is paid for such improvements and the taxes he has paid, and interest, together with his purchase money and interest, and after deducting all just allowance to be made to the plaintiff, they are willing to deliver possession to the plaintiffs on payment by them of the sum of \$881. The defendants afterwards by Judge's order, reduced their claim to \$520.

The case was tried at London before Harrison, C. J., without a jury, at the Fall Assizes of 1877.

The plaintiffs' title was not denied by notice, and it was admitted at the trial. The defendants began.

Wm. Patrick, one of the defendants, was examined. He said: Soon after getting the deed of the 16th of March, 1870, I took possession of the property and put up a fence and buildings upon it. I have had possession from that time forward, and have paid the taxes, and whatever rent has accrued from the property I have received. I had to level the ground before I could build. [The rest of his evidence in chief related to the nature and value of his improvements.]

Cross-examination.—I bought part of lot eight, east of the Wortley road—the same parcel of land. I gave two dollars. I cannot say whether I got a certificate or not. There was a difficulty about getting a description of the land. I got the description after the year was out. There was no description got until I got the deed. Mr. Mara told me there was a defect about it. It seemed to be a broken front. The description in that deed appears to cover Churcher's house and barn, I believe, but I cannot swear positively.

Adam Murray, the county treasurer, said:—I have been treasurer for a number of years. I made the deed to Patrick. I knew the piece of land that was intended to be sold. I prepared the notice to put in the "Gazette," and the public press. I know this particular road out of the city, and the bridge at the end of it, and Queen street that goes over it. The piece of land that was intended to

be sold bounds immediately on the left as you cross the bridge on the east side of Queen street; from that it goes to the river, and from the bridge southward, so as to include that small gore supposed to be a quarter of an acre. That is what I intended to give notice of in the "Gazette" and the local press. I took that from the assessment. It was invariably assessed as part of eight east of Wortley. I cannot say what it is assessed as now. This is the warrant under which the land was sold. It is described as part of eight, east of Wortley, one quarter of an acre. That is the description in the warrant. The amount of taxes in the warrant is \$14.82, and its date is the 18th of August, 1868. Pursuant to that sale I made the deed. I took it from the assessment. It was invariably assessed in that way.

Cross-examination.—The warrant follows the description in the assessment roll exactly. The advertisement followed it except as to the name of the owner. The warrant does not state the name

Q. How do you derive your knowledge as to what was intended to be sold ?

A. I did not assess the land. I had the information from the assessor.

Q. Do you of your own knowledge know what land was intended to be assessed ?

A. I do not.

Re-examination.—I conduct these sales. On the day of sale I did not specifically describe that piece of land.

Q. Did you not point out where that piece of land was ?

A. I described the locality in which it was situated as I have described it to-day, namely, immediately on the left hand on crossing the bridge, &c., &c.

Q. And where the house was burned ?

A. Yes, I mentioned about the house being burned so far as I recollect.

Re-cross-examination.—Q. Was any part of lot five east of the Wharnccliffe road included in the schedule of the warrant ?

A. I did not see any part of five.

Second re-examination.—Q. As a fact you do not know whether it is five or eight?

A. I do not. There is a difficulty with regard to that in the registry office. No one but Mr. Patrick has paid taxes since the sale, so far as I know; but there is no record kept of that in my office. I have received none.

The description in the deed to Mr. Patrick was as follows:

“Being composed of part of the east part of lot number eight on the east side of the Wortley road, in the township of Westminster, in the county of Middlesex, and is butted and bounded as follows, that is to say, commencing at the north-west corner of lot number one on the east side of Queen street, in the survey of parts of lots numbers six, seven, and eight, on the east side of the said Wortley road, made for the late James Hamilton, Esq., and Mr. Robert Carfrae. Thence parallel with Carfrae street in said survey, to the west bank of the east branch of the river Thames. Thence north-westerly, along the west bank of said river, down the stream to the intersection of said Queen street by the said river. Thence south along the easterly limit of said Queen street to the place of beginning—said parcel of land containing one quarter of an acre, be the same more or less.

For the plaintiff: A patent was produced, dated 1st September, 1834, to Robert Carfrae, of lot number eight, on the east side of Wortley road, in the township of Westminster, commencing where a post has been planted in the limit between lot numbers seven and eight, and in the eastward limit of Wortley road; then along the easterly limit of Wortley road, twelve chains, more or less, to the limit between lot number five, east side of Wharncliffe highway, and the said lot number eight; then north eighty-one degrees, thirty minutes, twenty-three chains; then north two degrees thirty minutes west to the river Thames; then easterly and southerly along the water's edge to the limit between lots numbers seven and eight; then south eighty-one degrees thirty minutes west, forty chains, more or less, to the place of beginning.

Robert Carfrae said: I am the patentee of lot eight east of the Wortley road. It was subsequently divided into town lots. I know the piece of land in dispute. It never formed a part of my lot, and never was so treated. I point out the boundary of my lot on a map. The little gore between the road and the river is the Hunn property. It belongs to number five. Five originally belonged to Colonel Burwell.

Cross-examination.—I have seen a plan in the registry office.

A part of lot number five east on the Wharncliffe highway, containing fourteen acres more or less, and east of Wortley road, which passes through number five, is described in a deed from Burwell to James Givins of the 17th of November, 1842, as follows: commencing in the southern limit of said lot No. 5, east of Wharncliffe highway, and on east side of Wortley road, thence north eighty-one degrees, thirty minutes east, twenty-three chains, more or less, to rear of lot number five. Then north two degrees, thirty minutes west, three chains eighty-eight links more, or less, to the water's edge of the river Thames. Then following the said river down the stream to opposite a point in the eastern limit of the Wortley road at the distance of three chains measured along the eastern limit of Wortley road from the southern limit of lot number five. Then south eighty-one degrees, thirty minutes west, one chain fifty links, more or less, to the same point in the east limit of Wortley road. Then southerly along the eastern limit of said road, three chains to the place of beginning.

There was a good deal of evidence given as to the value of the improvements, which is not material.

The learned Chief Justice disposed of the case as follows:

“The plaintiffs seek to recover a piece of land described as being a part of lot number five, east of the Wharncliffe road, in the township of Westminster, particularly described by metes and bounds.

The defendants claim that the same was in 1868 sold for taxes, under such circumstances as to entitle the pur-

chaser, Wm. Patrick, a defendant, to an assessment of damages pursuant to 33 Vic. ch. 23, sec. 9, O.

The land in question was in arrear for taxes, and was intended to be sold therefor. But it was described in the advertisement for sale and warrant for sale as being part of lot eight on the east side of the Wortley road in that township, and was sold under that description.

The deed to the purchaser contains a general and particular description. The general describes it as being part of lot eight, on the east side of the Wortley road, but the particular description shews it to be a part of lot five, east of the Wharnccliffe road, and covers the piece of land described in the warrant.

The defendants took possession under the deed of the land described in the warrant, and made improvements upon it which, with other charges, they claim under the said section of the aforesaid statute.

The plaintiffs contend that the enactment in question is inapplicable. For the present I hold that the enactment is applicable, and shall proceed to assess damages for the defendants under that enactment."

The result was, that damages were assessed for the defendants at \$410.51, and the land was valued at \$500, and a verdict was rendered for the plaintiffs.

During Michaelmas term, November 23, 1877, *Meredith*, Q. C., for the plaintiffs, obtained a rule calling on the defendants to shew cause why the assessment of damages made by the learned Chief Justice under the statute, 33 Vic. ch. 23, sec. 9, O., should not be set aside, on the grounds :

1. That the said land was not in arrear for taxes, and was not authorized to be sold for taxes, and was not in fact so sold, and the warrant did not direct or authorize any such sale.

2. That section nine of the said statute is only applicable to cases where the tax purchaser's title would, but for the insufficiency or uncertainty of the description, be valid, and the purchaser's title was, in this case, invalid apart from and independently of that objection.

Or why the damages should not be reduced to the sum of \$250, or such judgment given and verdict and finding made and entered as ought to have been made on the law and evidence, pursuant to the provisions of the Law Reform Act.

December 3, 1877. *Glass*, Q. C., shewed cause. The defendants contend they are protected for the improvements they have made by 33 Vic. ch. 23, sec. 9, O., which enacts that where lands have been legally sold for taxes, and the sale or conveyance is invalid by reason of uncertain or insufficient description of the land assessed, sold or conveyed, and the purchaser has entered, and has improved, he shall, in case ejectment is brought against him, be entitled to the value of his improvements made on the land. It is said that the part of lot five which the defendant has in his deed, as purchaser at the tax sale, was not liable to be sold for arrear of taxes, and that the warrant to sell did not include any part of lot five as in arrear for taxes, or liable to be sold, and that the assessment, sale or conveyance is not "invalid by reason of uncertain or insufficient designation or description of the lands," but that the sale and conveyance are invalid because there were no arrears of taxes shewn to be due on any part of lot five, and the warrant does not apply to any part of lot five, and that the portion of lot five which is in question in this cause was erroneously sold as part of lot number eight, which did owe taxes. The clause in question is, however, large enough in its terms to include such a case. The treasurer did sell, and did intend to sell, and pointed out at the time of sale, the identical piece of land of which he afterwards made the deed to the defendant. It is true he pointed it out as part of lot number eight, because the land the very spot in question is the piece which was assessed, and was in arrear for taxes, and was assessed as part of lot number eight, in place of part of number five, and that is a mere "uncertain or insufficient designation or description of the land assessed, sold or conveyed."

Meredith Q. C., contra. The learned Chief Justice found the land for which this action is brought was in arrear for taxes, and was the land intended to be assessed and sold. The treasurer said so, but he also said he knew so only from the assessor. To bring the case within section 9, there must be taxes due on the land sold, there must be an actual sale, and the sale must be one which is invalid only by reason of the uncertainty or insufficiency of the description of the land in the deed, or in the assessment or sale of it. The assessment was of "quarter of an acre, part of lot eight, east of the Wortley road, Johnston estate." The warrant described the land in the like way. So also was it described in the advertisement—leaving out "Johnston estate." The deed calls it also part of lot eight, east of the Wortley road; but by the abutments by which it is more particularly described, it is manifest it is a part of lot number five, east of the Wharncliffe road, and not part of lot number eight, which was assessed, advertised, sold, and conveyed. The abutments of the deed do, however, include a part of lot number eight, which the plaintiffs have nothing to do with. The whole of lot eight includes about 46 acres, and lot five includes about 100 acres. Section 9 gives the purchaser, whose case is within it, the amount of the purchase money paid at the sale, and the interest thereon. That in some cases would be unjust, for if one lot were in arrear for taxes \$1, and a second lot was in arrear to the amount of \$100, and the first lot was sold by the designation of the second lot for the \$100 arrears of taxes, the purchaser of the first lot would, by the wording of the section, be entitled to recover from the owner of the first lot the whole \$100, although there was only \$1 due upon it. The sale was of a part of lot eight, and that lot was the one intended to be sold, and the treasurer mis-described what he did sell. There is here no uncertainty or insufficiency of description. It is a wrong and different parcel of land which was sold from that which should have been sold. Every case was not provided for by 33 Vic. ch. 23, sec. 13, O. The 36 Vic.

ch. 22, is the one under which the claim should have been made, if one were made at all; and it should not have been made under the Act of 1869. The Act of 1873 provides when any person has made lasting improvements on the land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the land to the amount by which the value of the land is enhanced by such improvement. The evidence shews that the land, as it was at the trial, with the improvements, was not worth more than \$750; and that the land without the improvements was worth \$500. The damages assessed should therefore be reduced, if an assessment is to be allowed, to \$250. The charges, \$7.43 for tax-deed and registry, and for search and description of land, and interest, should not have been allowed. The sum of \$10, which the defendant P. received in 1874, for rent, should have been charged against him. The defendant P. was in possession for 17 months, and he should have been charged for that time at \$6 a month, equal to \$102, while only \$60 have been charged against him. These additional credits to the plaintiffs, amounting to \$7.43, \$10, \$42, in all \$59.43, should be deducted from the assessment of \$410.51, which would leave \$351.08 against the plaintiffs at the most, if the defendant P. is entitled to his improvements, and to have them assessed on the principle on which they were assessed. He referred to *Forsyth v. Boyle*, 28 C. P. 26; *McNish v. Munro*, 25 C. P. 290; *Doe d. Notman v. McDonald*, 5 U. C. R. 321; *Fisher on Mortgages*, 3rd. ed., 943.

February 4, 1878. WILSON, J.—The evidence shews that the land which was assessed as a part of lot eight, was the land which was afterwards advertised and described in the warrant, and sold and conveyed as a part of lot eight.

The taxes were due upon that particular piece of land which was so described and sold and conveyed.

But the land which was so assessed and sold was wrongly

described; the true description of the land was, and should have been, that it was a part of lot five and not of lot eight. But a small gore to the east of lot five and extending to the Thames, is in fact a part of lot eight. But it does not come into question in this suit. The plaintiffs claim only the northerly part of the small piece of lot five which lies south of the bridge, and is bounded by Queen street on the west, and the river on the east. The defendant P.'s deed covers far more than the plaintiffs' claim.

The question is, is this a case within sec. 9 of 33 Vic. ch. 23, "where lands having been legally liable to be assessed for taxes, have been * * * sold as for arrears of taxes, and such sale, or the conveyance consequent thereon, is invalid by reason of uncertain or insufficient designation or description of the lands assessed, sold, or conveyed."

I am of opinion it is. The identical land sold was the land which was legally liable to be assessed for taxes, and it was sold for such arrears, and the sale and conveyance are invalid by reason of the uncertain or insufficient designation or description of the land assessed, sold, and conveyed.

The land was assessed by the wrong number of lot, but the identical piece was assessed which was meant to be assessed by the mistaken number. That is a case within the very terms of the Act, where the sale or conveyance is invalid by reason of the uncertain or "insufficient designation or description of the land assessed, sold or conveyed."

The Legislature meant to protect purchasers buying in such a case, when they bought *the very land assessed and liable to be sold*, although they bought it by a wrong description of it.

The purchase may be invalid, but the purchaser is to be protected by getting back what he has paid for the land, and for the improvements he has made upon it, with interest.

The plaintiffs are bound to pay to the defendant P. the purchase money and interest, and subsequent taxes and interest, and his loss in consequence of improvements made before the commencement of the action, after giving credit to the plaintiffs for all just allowances.

The \$7.43 above mentioned for the deed, description and registry, should not be allowed. The plaintiffs get no benefit by them, and they are not covered by the above items of claim mentioned in the statute. The \$10 also should be allowed for the boots and shoes he got by way of rent in 1874, and interest for three years, \$1.80, equal to \$11.80. He should also be allowed for the five months which Bates said he owed the defendant, at \$6 a month, for rent, but which he had not paid, equal to \$30. These three sums amount to \$49.23, and deducting that sum from the amount assessed of \$410.51, will leave the damages to be paid by the plaintiffs to defendant, \$361.28.

The rule will be to reduce the defendants' damages to \$361.28, and the residue of it will be discharged.

There will be no costs to either party.

HARRISON, C. J., concurred.

MORRISON, J., heard the case argued, but was transferred to the Court of Appeal before judgment was given.

Rule accordingly.

REGINA V. THE OTTAWA AND GLOUCESTER ROAD CO.

Road company—Neglect to repair—Indictment—R. S. O. ch. 152.

A road company, incorporated under 16 Vic. ch. 190 and subsequent acts, (now R. S. O. ch. 152) are not subject to indictment for not keeping their road in repair, where the liability to repair is admitted; the special remedies given by the Act must be resorted to. But where the dispute is, whether the part out of repair is part of defendants' road, an indictment will lie.

Seemle, that the proper mode of objecting to such an indictment is not by demurrer, but by removing the indictment by *certiorari*, and moving to quash it upon affidavit shewing the facts.

DEMURRER. Indictment: The jurors for our lady the Queen upon their oath present that the Ottawa and Gloucester Road Company is incorporated under the provisions and by the authority of the Consol. Stat. C. ch. 49, for the purpose of constructing a certain macadamized road, and did construct a certain macadamized road, commencing at, &c., (describing the road); and the said company did construct the said road, and did and have at all times since charged and collected tolls upon the said road from her Majesty's liege subjects and others travelling thereon and along with horses, carts, coaches, wagons, sleighs, and other vehicles; and that a bridge commonly called "Billing's Bridge," across the Rideau River, is in the line of the macadamized road and between the termini thereof, along which said road and bridge all her Majesty's subjects are to pass and repass with their horses, &c., at their free will and pleasure, subject only to the payment of toll to the said company; and it was, and hath been, and is the duty of the said company, from the first day of February, 1868, and thence hitherto, to uphold, maintain, amend, and repair the said bridge so that the liege subjects of our lady the Queen, upon and over the said bridge with their horses, &c., might go, return, pass, repass, ride, and labour at their free will and pleasure; and that the said bridge, on the 14th day of April, 1876, and continually afterwards until the taking of this inquisition, at the said townships of Nepean and Gloucester, was and yet is very

ruinous, broken, dangerous, and in great decay for want of upholding, maintaining, amending, and repairing the same, so that the liege subjects of our said lady the Queen, upon and over the said bridge with their horses, &c., could not, during the time last aforesaid, nor yet can go, return, &c., as they before used and were accustomed to do, and still of right ought to do, without great danger of their lives and loss of their goods, to the great damage and common nuisance of all the liege subjects of our lady the Queen, upon and over the said bridge going, returning, passing, repassing, riding, and labouring, and against the peace of our lady the Queen, her crown and dignity; and that the said bridge is not within the limits of any city, incorporated town, or village; and that the said company ought to make, rebuild, repair, and amend the said bridge, when and so often as it should or shall be necessary.

Demurrer, on the grounds:—

1. The offence charged is not as against the defendants any offence at common law, and the indictment does not bring them within the operation of "The Act respecting Joint Stock Companies for the construction of roads and other works in Upper Canada," or any other statute applicable to the case.

2. The neglect of duty, if any, if the bridge was a public one, subjected the defendants to forfeitures, and especially provided by the Act, and was not the subject of indictment.

3. For aught that appears in the indictment, the bridge may have been on private property, in which case the offence would not be indictable.

4. The indictment does not allege that the defendants ever either acquired or constructed the bridge, or that the bridge had been completed and tolls established thereon, all which are conditions precedent to the company being bound to keep it in repair.

5. The bridge in question is not alleged to form or be a part of any public road, or to be a public bridge, or that all her Majesty's subjects had a right to use the same.

6. It is not alleged in the indictment that the bridge is a

part of the defendants' road at all, except by implication, which would be insufficient, as all material allegations in the indictment must be positive. But even if this could be supplied by implication from the indirect allegation that it is in the line and between the termini thereof, then it should negative that it was "specially excepted in the instrument of association of the company," which it does not do.

7. The indictment does not charge that the bridge is out of repair.

8. Time is not sufficiently stated. It is not stated that the defendants were an incorporated joint stock company, or had any existence as such at the time of committing the offence complained of; it is only alleged that the company is incorporated. Time must still be stated when it is material, as in suits against officers, &c. It must be stated that they were such at the time, &c., and this must also be proved. The usual allegation, that before and at the time of the committing of the offence, &c., the defendants were, &c., (naming them) is entirely omitted, and its place is not supplied by any allegation in the indictment.

9. There is no sufficient local description in the body of the indictment.

February 7, 1878. The demurrer was argued before Gwynne, J., sitting for the full Court.

Beaty, Q. C., for the defendants.

M. C. Cameron, Q. C., contra.

February 8, 1878. GWYNNE, J.—The question submitted by this demurrer is, whether the defendants, who are a road company, incorporated under the Acts in force in this Province regulating joint stock road companies, are liable to be proceeded against by indictment as well as by the special process authorized by the Joint Stock Company's Act, upon a charge that they have suffered their road, or what is said to be a portion of it, to be out of repair; or

whether, as the defendants contend, the remedy pointed out by these Acts, in virtue of which alone the defendants obtain their existence, and have imposed upon them the duty of keeping their road in repair, is the only one to be pursued, the remedy by indictment being impliedly excluded by the precise and perfect terms of the remedy furnished by the statutes.

The statute under which the defendants are incorporated is 16 Vic. ch. 190, as amended by subsequent Acts.

The 34th section of that Act imposed in terms the duty upon the defendants to keep their road when completed and tolls should be established thereon, in good and sufficient repair. The sentence by which this obligation is imposed is coupled with that which provides the remedy for breach of the duty by the copulative conjunction "and," thus, "and whenever any such company shall suffer any portion of their road on which tolls shall have been taken as aforesaid to go to decay or get out of repair, it shall and may be lawful for the Judge of the County Court in the county in which such road is situated, upon the requisition of twelve freeholders residing within such county, stating that such road is so much out of repair as to impede or endanger her Majesty's subjects and others travelling thereon, to direct the engineer for the county, and if there be no such county officer then any competent engineer, to examine the said road; and it shall be the duty of such engineer so appointed upon receiving such directions immediately to inspect and examine the same; and if upon examination the road shall be found so much out of repair as to impede or endanger Her Majesty's subjects and others travelling thereon, as stated in the requisition, then he shall notify the president of the company to whom the road may belong, by leaving a written notice with any of the keepers of the toll gates belonging to such company, stating that in pursuance of directions from the Judge of the County Court he has inspected their road and found it to be out of repair, and requiring them to take notice thereof, and cause the same to be repaired within a certain

limited time to be named in such notice, and which time shall be such as in the opinion of the engineer will be ample and sufficient for making the required repairs.

Then the 35th section enacted that unless the necessary repairs were made within the time specified in the notice the company should not, after the expiration of such period, demand or receive toll from any person passing through the nearest toll gates on either side of the portion so reported to be out of repair.

And by the 36th section it was enacted that if the keeper of any toll gate on a road belonging to a company which shall neglect to make all necessary repairs within the period prescribed in the notice mentioned in the 34th section shall, after the expiration of such period, and before such repairs shall be completed, demand or receive toll at such nearest toll gates to the portion out of repair, or shall refuse to permit any person to pass through such toll gates without payment of toll, he shall, upon conviction before any justice of the peace for the county, forfeit and pay a sum of not less than five shillings nor more than twenty shillings for every such offence.

The above 34th section is, with slight variation of language, consolidated in secs. 84, 85, and 86, of the Consolidated Statutes of Upper Canada ch. 49, and the 35th and 36th secs. of the former Act in the 87th and 88th secs. of the latter. 28 Vic. ch. 23 made some amendments to this consolidated statute, which it is unnecessary to particularize, for that Act is wholly repealed by 35 Vic. ch. 33, O.

It is also unnecessary to particularize certain amendments made by 29 Vic. ch. 36, for in lieu of them, 31 Vic. ch. 31, O., substituted a new 87th section of the Consol. Stat. U. C. ch. 49, extending very materially the remedy thereby given; and, again, 35 Vic. ch. 33, substituted new sections 85 and 86, in lieu of secs. 85 and 86 of the Consol. Stat.; and also amended the 87th section which had been amended by 31 Vic. ch. 31; then 37 Vic. ch. 24, amended again sec. 85 of the Consol. Stat. ch. 49.

All these sections so amended are collected in continuous

form in the Revised Statutes of Ontario, ch. 152, sec. 98 *et seq.*, all which being, as I have shewn them to have been, enacted in substitution for and in lieu of sections in the original Act, 16 Vic. ch. 190, must be now read as if they had been enacted in and by that Act.

The Act therefore which imposed the duty of repair upon the defendants, enacted by way of a remedy to the public, in the event of a breach of that duty occurring, that the Judge of the County Court of the county in which the road is situated may, upon the requisition of twelve freeholders residing within such county, stating that such road is so much out of repair as to impede or endanger Her Majesty's subjects and others travelling thereon, direct any competent engineer, not being a shareholder in the road, to examine the road, but such requisition shall not be presented to the county Judge until at least six days written notice thereof, signed by one or more of the said freeholders, of such intended requisition has been given : Rev. Stat. O., ch. 152, sec. 99. And wherever an engineer has been so directed by the Judge to examine any road, he shall be sworn before the county Judge to do so impartially : Sec. 100.

And if the engineer upon examination shall find the road to be out of repair, he shall notify the company thereof in a prescribed manner by a written notice, specifying the particular portion out of repair, and requiring the company to repair it within a time to be specified in the notice : Sec. 101.

At the expiration of the time named, he shall again examine the road, and if he find it repaired he shall certify the same if required by the company ; but if he find the repairs not made, he may, in his discretion, allow further time for making the repairs without discontinuing the taking of tolls ; but if he does not grant such permission, or if he should grant it and the repairs should not be made within the extended time, then until the repairs shall be completed no tolls shall be demanded or taken from any person passing through the nearest toll gates whereat tolls

were being taken at the time of the notice, on either side of the portion so notified as out of repair, under a penalty, to be collected upon conviction before a justice of the peace of the county, of not less than one dollar, nor more than four dollars for every such offence, until the road is certified to be in good repair : Sec. 102.

Then, if the directors of the company dispute the road being out of repair as reported by the engineer, they may apply to the Judge, who shall thereupon summon the directors and engineer before him, and take evidence upon oath touching the state of repair ; and after hearing such witnesses as shall be brought before him, shall decide and certify whether the portion reported by the engineer to be out of repair is so or not, and if he decides that it is out of repair, then the directors shall cease to take tolls at the nearest gates on either side of the portion so decided to be out of repair ; and until the Judge shall give his decision upon the question so submitted, it shall be in the discretion of the Judge to permit or prohibit the company taking toll at such gates : Sec. 103.

Thereafter, until the necessary repairs are made, the company shall collect no tolls at such gates, nor any person for them, under penalty for every such offence of not less than \$1 or more than \$4 : Sec. 104.

When the company shall, as they conceive, have put the road in repair, if the engineer refuse to give his certificate to the effect that the repairs are sufficient, the directors may appoint an arbitrator and give notice thereof to the persons who signed the requisition upon which the order to examine the road issued, or to any two of them, calling upon them to appoint an arbitrator, which if they fail to do the sheriff of the county shall appoint one for them, and the two so named shall appoint a third : Sec. 110.

If the two arbitrators fail to appoint a third, the Judge of the County Court shall appoint the third : Sec. 111.

And the arbitrators shall be sworn to make a true and impartial award : Sec. 112.

And to proceed with the arbitration, and in case they

shall find the road is not in a proper state of repair, they shall set forth what repairs are necessary to be made, and shall allow a reasonable time for making them, and may permit the company to levy tolls, or prohibit them from levying tolls, while the repairs are being completed, as to them may seem fit and proper: Sec. 113.

The award shall be made in duplicate, one copy whereof shall be forthwith filed in the office of the first Division Court of the county in which the road or the greater part of it is, and the other shall be served upon the president of the company, and the award shall be final and binding upon all parties: Sec. 114.

At the expiration of the time given by the arbitrators to repair the road, they shall examine it, and if the repairs are made the arbitrators shall give a certificate to that effect; if not made, they may, if they think fit, extend the time, and so from time to time, with power to permit or prohibit again the levying of tolls if they think fit: Sec. 115.

If the road is not put into a sufficient state of repair within three months next after the expiration of the time at first given by the engineer in his notice, the company shall not levy tolls at the two nearest gates on either side of the portion reported to be out of repair, under the penalty mentioned in the 107th section, until it is put in repair, and for every additional three months that the road shall continue out of repair they shall forfeit the right to demand or take toll for two additional toll-gates on either side of the toll gates in respect to which they had last before forfeited the right to take toll: Sec. 120.

And if the road continue out of repair for nine months, the company shall wholly forfeit their franchise, and the municipal council of the county may acquire and put the road in repair, and may take tolls: Sec. 121.

And if they do not within one month after the expiration of the nine months assume the road by by-law as a toll road, the road shall vest in the municipality as a common public highway, subject to the same duties as the municipality is liable to in respect of other public roads within its jurisdiction: Sec. 122.

The provisions here enacted are similar to, but more extensive than the provisions in the English General Highway Acts, 5 & 6 Wm. IV. ch. 50, secs. 94, 95, and 25 & 26 Vic. ch. 61, secs. 18, 19. The 94th section of the former Act, which prescribed the mode of proceeding before the justices if the highway should be out of repair, provided, nevertheless, that the justices should not have power to make the order by that section authorized, where the duty or obligation to repair the highway should come in question; and sec. 95 enacted that if, upon the hearing of any summons respecting the repair of a highway, the duty or obligation to repair should be denied by the party charged therewith, the justices should direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed at the next Assizes, or at the next General Quarter Sessions of the Peace. And the 96th section enacted that no fine, penalty, or forfeiture for not repairing the highway, or for not appearing to any indictment for not repairing the same, shall be returned into the Court of Exchequer, but shall be paid and applied towards the repair of the highway.

The old mode of presentment by justices under 13 Geo. III., ch. 78, was wholly repealed.

From all the cases which I have seen, I do not find that it has been the practice to indict for want of repair of a highway since the passing of 5 & 6 Wm. IV., ch. 50, except where an indictment was made necessary by this provision in the 94th section, or where it is denied that the particular road is a highway. The proceeding by indictment seems now to be limited to cases in which the parties charged before the justices deny their liability to repair, or to cases raising the contention that the road charged to be out of repair is not a highway. See *George v. Chambers*, 11 M. & W. 149; *Regina v. Wilts*, 8 Dowl. P. C. 717; *Regina v. Heanor*, 6 Q. B. 745; *Regina v. Trafford*, 5 E. & B. 967; *Regina v. Arnould*, 8 E. & B. 550; *Williams v. Adams*, 2 B. & S. 312, and *Regina v. Farrer*, L. R. 1 Q. B. 558.

Cockburn, C. J., in the last case, which raised the question whether the jurisdiction under the statute applied where it was *bonâ fide* denied that the road was a highway, in giving judgment says, at page 564: "I cannot think that the Legislature in giving justices a summary jurisdiction to compel the proper parties to put a highway into repair when it is out of repair, intended to substitute this summary jurisdiction for that of a jury to try the question whether the road was a highway or not. I cannot but think that the summary jurisdiction created by the statute was intended to be confined to cases in which there is no dispute as to the fact of the road being a highway, but the only question is, whether the highway needs repair. If it is shewn to the justices that a highway is out of repair, and that it is necessary for the convenience of the public that it should be repaired, it is a matter into which they have jurisdiction to enquire; and it seems to me, that if the highway is out of repair, they must make an order upon the proper persons to repair it; but if on the enquiry the liability to repair is denied, the justices must order an indictment to be preferred; but where it is disputed that the alleged highway is a highway, the justices have no jurisdiction to order an indictment." Then adopting the language of Hill, J., in *Ex parte Bartlett*, 30 L. J. Mag. Cas. 65, he confines the application of secs. 94 and 95 of 5 & 6 Wm. IV., ch. 50, to admitted or undisputed highways.

In the same case, Blackburn, J., says, at page 567: "The intention of the Legislature therefore was, when a highway is out of repair, that the public, instead of having recourse to the common law remedy by indictment, should have a summary remedy against the person bound to repair it, and for that purpose jurisdiction is given to justices under secs. 94 and 95 of 5 & 6 Wm. IV. ch. 50, to compel the repair of a highway." And again he says, at the same page: "Under sec. 19 of 25 & 26 Vic. ch. 61, the justices have only jurisdiction to order repairs by persons liable to repair, but they have not entrusted to them any jurisdiction of determining whether the road be a highway or not.

The liability to repair may involve a question of title." And again, at page 568: "I think, bearing in mind the object of the Legislature, it is clear what is meant by this section, 5 & 6 Wm. IV. ch. 50 sec. 95, is: "when an admitted highway is out of repair, and the duty or obligation to repair it is not denied, then only can the justices order an indictment."

And Mellor, J., in his judgment explains the statute thus at page 568: "Where *it is disputed* that the road is a highway, the prosecutor must proceed in the ordinary manner to enforce the repair of the highway by indictment, for the statutes do not take away the power of any person to prefer an indictment; but if the parish *admit* the road to be a highway, and deny their liability to repair it because some one else ought to repair *ratione tenuræ*, or for some other cause, then I think the justices are bound to make an order directing an indictment to be preferred."

Our Act differs from the Imperial Act in this, that our Act does not empower or direct the justices to order an indictment to be preferred, as the Imperial Act does if the liability to repair should be denied, but it seems to me that there is good reason for this difference, for our Act does not profess to deal as the Imperial Act does with all general highways, but only with a particular description of roads which, although the public have an interest therein, are the private property of the companies constructing them: *St. Catharines, Thorold, and Suspension Bridge Road Co. v. Gardner*, in Appeal, 21 C. P. 190.

As it is only with such roads that the Act deals, and as it is only upon the proprietors of them that the duty to repair is expressly imposed by the Act under which the companies became incorporated and the roads constructed, the Legislature very probably deemed it to be unnecessary to make provision for the case of their disputing that liability to repair.

The companies are empowered by the Act to construct their works wholly upon lands purchased by them for the express purpose, if they should think fit so to do; and, although they are also authorized to construct them on,

along, or over any public road or highway, subject to municipal consent in certain cases, yet when constructed the roads are vested in and made the property of the company: Sec. 60 of the Consol. Stat. U. C. ch. 49, and the obligation to keep in repair is imposed equally in respect of a work constructed wholly upon private property as in respect of any part of a public highway taken for the work.

In view of these facts, and of the very perfect and effectual remedy given by the Act which imposes upon the company the duty to keep in repair, and of the very imperfect remedy by indictment at common law, in which case no provision is, by any law that I have been able to find, made for applying any fines to be imposed upon conviction or for not appearing to an indictment towards the repair of the road, and in view of the fact that at common law the only means of enforcing either appearance to the indictment or obedience to a conviction is by *distingras in infinitum* upon the whole works of the company, whereas the Act provides a graduated scale of forfeiture of the right to levy tolls in proportion to the length of time the road shall be suffered to remain out of repair, culminating in the total forfeiture of the franchises and property of the company if the default should be suffered to continue for a specified time—I am inclined to think it was the intention of the Legislature that for any neglect to repair a road, admitted to be under the Act, the sole remedy should be that given by the Act, and that the rule in *Couch v. Steel*, 3 E. & B. 402, at p. 412, ought to prevail.

There the Court says: "The statute * * * which creates the duty, also makes the party who ought to perform it liable to a penalty for non-performance. * * * The penalty being annexed to the offence in the very clause of the Act creating it, no indictment or other proceedings could be taken against the person making default for the mere breach of a duty cast upon him by the Act. The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for breach of it, *except for the*

particular mode of punishment prescribed by the Act. As far as the *public wrong is concerned, there is no remedy but that prescribed by the Act of Parliament.*" This, I take to be the law and practice in England, under the General Highway Acts, in respect of matters brought by those Acts within the cognizance and jurisdiction of the justices as pointed out in those Acts. But, although of this opinion, still the remedy by indictment must of necessity exist in respect of any matter, if there be any, not brought under the cognizance and jurisdiction of the Judges of the County Courts by our Acts; and that there is a matter for which these Acts fail to provide, appears to me to be established by one of the objections raised by the defendants to proceeding by indictment in this case. There is no doubt that the question as to liability to repair, or whether the piece of road alleged to be out of repair is or not part of the defendants' work and property, is not as likely to arise under our Act as it is in respect of general highways in England, but still such a question may *bonâ fide* arise, and if it should, no provision is made by the statute for determining it.

So that the case of *Regina v. Farrer*, L. R. 1 Q. B. 558, specially applies to this case. Now the defendants in argument here say that the real point in dispute is, whether or not the defendants are under obligation to *maintain a bridge*, which they contend is not, but the prosecutors contend is, part of their road, and that the obligation imposed upon them by the statute extends to it. This the defendants deny. This is the contest. And if it be, as I must assume to be upon this demurrer, especially when the defendants are the persons who say that it is, then I am bound to say that I see no provision in the statute for determining that controversy, and that therefore the right to proceed by indictment must exist, upon the authority of *Regina v. Farrer*.

But even where the point really in dispute is whether a road admittedly the property of the company is out of repair, and so a question within the cognizance of the

special jurisdiction created by the statute under which the company sought to be charged is incorporated and made liable, and in such case an indictment should be found, either as the sole proceeding adopted or contemporaneously with proceedings under the Act, I do not think that the objection to such an indictment can well be raised by demurrer, for although the fact may be as I have suggested, still it would not be before the Court upon demurrer; nor, looking at the record or demurrer book, which is all that can judicially be brought under the notice of the Court, could it be said that the point intended to be tried was a question as to the liability of the defendants to repair the particular portion of road alleged by the indictment to be out of repair. When proceedings are taken by indictment in a case as to which there is no dispute of its being within the cognizance of the jurisdiction, the defendants, as it seems to me, upon the indictment being removed by *certiorari*, should bring the facts before the Court upon affidavit, upon motion to quash the indictment or otherwise. But for the reasons stated I must overrule the demurrer.

Judgment for the Crown.

REGINA V. WILKINSON.

Libel—Criminal information—Misdirection—Rejection of evidence—Grounds not taken in rule.

The defendant, having been convicted on a criminal information for libel, obtained a rule *nisi* for a new trial for the rejection of evidence, and for misdirection in ruling that there was no evidence to support the pleas of justification. Upon this rule coming up for argument the Court, under the circumstances, as a matter of indulgence, allowed to be argued, another ground of misdirection, not taken to the charge at the trial, in ruling that the libel implied malice, whereas the jury should have been told that, it being a privileged communication, the inference of malice was repelled.

The rule requiring any objections to the charge to be taken at the trial, applies in criminal as well as civil proceedings.

The learned Judge at the trial told the jury that the defendant must prove all the charges which he had justified: that the evidence fell far short of doing so, and that in his opinion they should find the pleas of justification against the defendant.

Per HARRISON, C. J., this was not so much a direction on the law as a strong observation on the evidence, and therefore not open to the objection of misdirection. But if so open, there was no misdirection, for the defendant was bound to such proof, and the observation was justified by the evidence, set out in this case.

Per WILSON, J.—There was evidence, upon the facts stated below, to go to the jury in support of the pleas of justification; and the defendant was entitled to a new trial for the misdirection.

The libel, which formed the subject of the first count, began by saying, "The party referred to by us as the head of a public institution, who purchased three votes at the time of the crisis, is the Hon. J.S.," the prosecutor. The second count was upon an alleged libel in which, besides specific charges against the prosecutor, he was said to be the most corrupt man in Canada. *Per HARRISON, C.J.*, the defendant was not entitled to put in evidence an article in a previous issue of his paper, charging the prosecutor with political intriguing, &c., on which a criminal information had been refused to the prosecutor; nor a letter written to the prosecutor alleged to be a request to supply money to be used for corrupt purposes, there being no evidence tendered of anything done by him in pursuance of such letter. *Per WILSON, J.*, such evidence was admissible; but as it was not formally pressed the rejection of it formed no ground for a new trial.

THE Hon. John Simpson, the relator, having obtained leave to file a criminal information against the defendant as to the articles published by defendant, under date 12th and 19th of November, 1875, availed himself of the leave: *Regina v. Wilkinson*, 41 U. C. R. 1.

The first count, which was based on the article of the 12th of November, 1875, averred that in 1873 the Right

Honourable Sir John Alexander Macdonald was the first minister of the Privy Council of Canada: that at a session of the Parliament of Canada, holden in that year, a stronger opposition than usual was evinced against his government, and every exertion made to put him in the minority in the House of Commons, and for that purpose to induce members of the House of Commons who had supported him to vote against him, and in consequence thereof a political crisis and change of ministry were imminent: that the defendant contriving and unlawfully, wickedly, and maliciously intending to injure, vilify, and prejudice the Honourable John Simpson, a Senator of Canada, did on, &c., print and publish of and concerning the said John Simpson, in a certain newspaper called the *West Durham News*, the following, that is to say:—"The party referred to by us as the head of a public institution, who purchased three votes at the time of the crisis, is the Honourable John Simpson, President of the Ontario Bank. Our evidence in the case was secured in this way:—Mr. Simpson boasted to different persons without even asking if they would accept of the confidence, of having bought three votes, and paid as high as \$30,000. We at first doubted the truthfulness of the boast, and looked upon it simply as a bit of swagger. Finding, however, that the same story had been repeated by him, we were at last led to institute a search, knowing that if Mr. Simpson bought three at such prices more had been purchased, which was rewarded in the substantiation of the fact of the purchase by Mr. Simpson and others named in our charge," the defendant meaning thereby that the Honourable John Simpson bribed three members of the House of Commons.

The second count, after setting forth introductory matter as in the first count, alleged the libel as follows: "Senator Simpson has telegraphed the *Ottawa Free Press* that he never spent a dollar in his life to purchase or secure a vote of a member or an elector on behalf of himself or any other party. Tell that to the marines. Who sent the \$2,000 to Clarke (meaning the township of Clarke) at the time of the Blake-Milne election, and who is it that still holds a claim of

\$800 for money spent at that time? Were we allowed so wide a scope as to prove that Mr. Simpson had been guilty of corruption we should have no trouble in fastening an abundance of it upon him. Indeed, we are compelled to look upon him as one of the most corrupt men in Canada. But our charge at this time is, that he bought up members of the Commons to defeat Sir John Macdonald's government in the time of the crisis in 1873, and we are not going to let side issues, or general statements, draw attention from this one fact." The defendant meaning thereby that the Honourable John Simpson caused \$2,000 to be expended in the township of Clarke in bribery, and that he, the Honourable John Simpson, was the most corrupt man in Canada, &c.

The defendant pleaded not guilty to the whole information, and pleas of justification to the first and second counts of the information.

The cause was tried at the last Fall Assizes at Cobourg, before Gwynne, J., and a jury.

There was evidence of publication by the defendant of each of the alleged libels.

Evidence was also given as to the parliamentary crisis, which resulted in the defeat of the Government of Sir John A. Macdonald, and the formation of a government under the leadership of the Honourable Alexander MacKenzie.

It was proved that Mr. Simpson was not at Ottawa during the crisis.

This closed the case for the prosecution.

On the part of the defence, Mr. *Cubitt* was called. He swore to a conversation with Mr. Simpson on the 23rd or 24th August, 1874; at which he said Mr. Thompson was also present. He represented that during the course of that conversation Mr. Simpson spoke of the crisis of 1873, of the change of government, and how it was brought about: that Mr. Simpson said there had been a good deal of difficulty in getting members over: that different members had been approached, and considerable sums of money paid to them for the purpose of inducing them to support the

opposition, that a very clever person had been employed to negotiate with the members: that one member had a mortgage of \$17,000 on his property. Of this he said "We had to pay the money"—Mr. Cubitt understanding "we" to refer to the Ontario Bank. He also, according to Mr. Cubitt's evidence, spoke of other sums having been paid to members of Parliament, but witness did not recollect the amounts; they were, however, he said, large amounts.

Mr. Cubitt proved that before the publication by the defendant of the libels complained of, he had communicated to the defendant what he had heard from Mr. Simpson. He also proved that before the article of the 12th November, 1875, was published, he saw it and objected to it as there were some points in it which were not correct, and it contained a personal charge against Mr. Simpson. One statement he particularly objected to was, that Mr. Simpson himself had purchased the members.

There was also evidence on the part of the defence that Mr. Simpson was an active man in parliamentary elections, and on one occasion gave £50 to a man who represented to him that he had spent a great deal of money on the Blake-Milne election.

Mr. *Thompson* was called, in reply. He remembered the occasion to which Mr. Cubitt referred, but had no recollection of Mr. Simpson saying "we had to pay money to gain people over." Did not hear anything about \$17,000 having been paid. Did not hear anything said as to a smart or clever person having been employed as agent for the purpose of getting members over.

Mr. *Simpson*, in reply, denied that any such conversation as Mr. Cubitt represented took place. He also swore that he was in the United States at the time of the parliamentary crisis in 1873. He admitted his activity in electoral contests, but denied any impropriety of conduct. He said, however, he used to influence voters by "a sort of mesmerism."

Counsel for the defence, in cross-examining Mr. Simpson,

proposed to enquire as to the article of the 5th of November, 1875, in reference to which the Court refused leave to file a criminal information (see 41 U.C.R. 3), but on objection by counsel for the prosecution, the learned Judge declined to receive evidence as to that libel, or anything relating to it.

Counsel for the defence then began to ask Mr. Simpson as to the letter from Mr. Brown, dated the 15th of August, 1872, commonly called "the Big Push Letter," (see 41 U.C.R. 11). Mr. Simpson swore he had no recollection of ever seeing that letter. Counsel was then proceeding to make further enquiry about the letter, but on objection from the counsel for the prosecution, was stopped by the Court.

This closed the evidence.

The learned Judge then left the case to the jury on the evidence.

He explained to them the law. He told them that a libel is a publication without justification or lawful excuse, calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule: that a publication may be a libel on a private person, which would not be so on a person in a public character or office, for the acts of public men, which concern the public, may be lawfully commented on, provided it be done without malice: that criticism of the conduct of public men is a legitimate weapon in the hands of a public journalist, provided it be fair and honest: that however keen and caustic it may be, it is quite legitimate if it be a fair criticism applied honestly in the interest of the public; but falsely to impute conduct which is indictable, or to impute bad or corrupt motives, is a libel whether in the case of a public man or private individual is unjustifiable: that if the defendant had satisfied the jury that the circumstances under which the publications complained of took place were such as to remove all just imputation of malice, the defendant was entitled to a verdict on the plea of not guilty; but, on the contrary, if the jury were satisfied that the matter complained of was defamatory, and that the circumstances did not remove the

just imputation of malice, the verdict should be against the defendant on that issue.

No objection was made to this part of the Judge's charge.

He then told the jury, as to the pleas of justification, that it was necessary for the defendant to prove all the charges which he had justified: that the evidence fell far short of proving the whole justified: that assuming all Mr. Cubitt said to have taken place exactly as he described it, still the evidence fell far short of the whole matter charged; and that in his, the learned Judge's opinion, whatever verdict the jury might render upon the plea of not guilty, they ought to find the pleas of justification against the defendant.

Objection was made to this part of the charge.

The jury found a verdict of guilty, and found the pleas of justification not true, but recommended the defendant to mercy.

During Michaelmas term last, November 23, 1877, *McCarthy*, Q. C., obtained a rule calling on the prosecutor to shew cause why the verdict should not be set aside and a new trial had between her Majesty the Queen and the defendant, on the grounds of rejection of evidence by the learned Judge in refusing to receive evidence of a letter alleged to be written by the Hon. George Brown to the private prosecutor, inviting him (the private prosecutor), to contribute to a fund to be illegally spent in certain parliamentary contests then pending, and further, in refusing to receive evidence of the publication by the defendant of an article on 5th November, 1875, referred to in the the alleged libellous publications; and on the ground of misdirection of the learned Judge, in holding that there was no evidence in support of the pleas of justification, or either of them.

December 6, 1877. *Bethune*, Q. C., appeared to shew cause.

McCarthy, Q. C., moved that his rule should be amended by inserting therein "or why a new trial should not be

granted, for the misdirection of the learned Judge in telling the jury that the libel in question implied malice on the part of the defendant, and that it lay upon him to shew, by evidence, such facts as should be sufficient to remove that inference, whereas he should have told the jury that the alleged libel being a privileged communication, the inference of malice was repelled, and that it lay upon the prosecutor to prove express malice on the part of the defendant, which had not been done." It was admitted that no objection of that kind was taken at the trial. He contended he was entitled to have the rule so amended, although he had not taken the objection at the trial, because the line of defence and argument for the defendant shewed plainly that the fact of the publication being a privileged one was fully and throughout the trial insisted upon and discussed; and the learned Judge's ruling and direction to the jury were so expressly adverse to the view of the defendant's counsel on that point, that the taking of any exception to it in that particular would have been the merest form, and would certainly have been over-ruled; and that it was perfectly understood at the trial that the defendant, by his counsel, was opposed to [and was opposing the direction of the learned Judge in that respect. He also contended that, although his rule to shew cause did ask for a new trial for the rejection of evidence, that he was nevertheless entitled to take any further ground for a new trial, because it was not necessary he should have mentioned any ground in the rule why the new trial should be granted, as the rule of Court requiring all grounds on which such a rule is issued to be stated is confined to civil cases only, and he was not precluded from taking any such further ground beyond his rule, because he had specified some ground or grounds for a new trial which were in his rule. He also contended that, if he could not support his motion as a matter of right, he was still entitled to urge these matters for his client upon the favour and indulgence of the Court, and he referred, on this last part of his argument, to *Rex v. Holt*, 5 T. R. 436; *Rex v. Waddington*, 1 East 143.

Bethune, Q. C., Delamere with him, opposed the amendment.

December 7, 1877. HARRISON, C. J.—No absolute rule has, according to the most recent judicial utterance on the subject, been laid down as to the time within which an application for a new trial must be made in a case like the present: See per Lord Campbell in *Regina v. Newman*, 1 E. & B. 268, 269.

The Courts, under particular circumstances, have allowed the application to be made after the first four days of term, and have, it is said, awarded new trials without any motion for the purpose, where the verdict appeared to be against justice. See *Rex v. Morris*, 2 Burr. 1189; *Rex v. Gough*, 2 Doug. 789; *Rex v. Holt*, 5 T. R. 436.

In *Regina v. Newman*, 1 E. & B. 268, 270, Lord Campbell said: "It must be understood that, for the future, when a new trial in a criminal case is moved for, an intimation must be given on one of the first four days of term that counsel is prepared to make the motion."

Here counsel moved for a new trial within the first four days of term, but only on the ground of rejection of evidence, and of misdirection on the part of the learned Judge in holding that there was no evidence in support of the pleas of justification, or either of them.

Counsel now, after the expiration of the first four days of term, and upon the return of the rule, asks for a new trial on the ground of misdirection in this, that the learned Judge refused to rule that the communication was privileged, and that there was no evidence of express malice for the consideration of the jury.

It is admitted that the learned Judge at the trial was not asked so to rule, and that the objection, as a point of law, was not taken at the trial.

The objection is, strictly speaking, one for non-direction, rather than misdirection, and is now for the first time raised in this Court.

The question is not so much as to the power of the Court in such a case as the present to entertain a motion for a

new trial after the first four days of term, but whether, assuming such a power to exist, there is under the circumstances any proper ground for the application.

The general rule in civil cases where there is a jury, is not to entertain a motion for a new trial upon a ground of misdirection or non-direction, unless the particular point in controversy was raised at the trial, and pressed upon the consideration of the learned Judge: *Manners v. Boulton*, 6 O. S. 663, 668; *Doe d. Morrough v. Maybee*, 2 U. C. R. 389; *Major v. Chadwick*, 11 A. & E. 571, 584, 585.

The rule rests on considerations of convenience and good sense, which are as much applicable to a criminal as a civil trial, especially where the parties to the litigation are represented by counsel. See *Regina v. Fick*, 16 C. P. 379.

None of the cases cited at the bar shew the rule to be inapplicable to criminal cases.

In *Rex v. Grant et al.*, 3 N. & M. 106, which was an information for a libel where evidence was tendered for one purpose to the presiding Judge, and rejected by him, but was admissible for another purpose not suggested to the presiding Judge, the Court refused to order a new trial, saying, "A Judge has a right to know the purpose for which the evidence is tendered."

Where the objection is one which, if well founded, shews that the verdict is against law and evidence, the Court has the undoubted power in a civil case to order a new trial, although the particular point was not raised at the trial: *Abley v. Dale*, 11 C. B. 378, 392; *Paton v. Currie*, 19 U. C. R. 388, 390; *Merner v. Klein*, 17 C. P. 287; *Houghton v. Thompson*, 25 U. C. R. 557, 561.

Much more ought this discretionary power to exist in a criminal case where the Court, before pronouncing judgment, must consider not only the legality but the justice of the verdict. See *Rex v. Holt*, 5 T. R. 436.

Had counsel for the defendant, when moving for the rule *nisi*, asked to have it issued on the additional ground that the verdict is "against law and evidence," we would not in this case have hesitated in allowing it to be so issued.

Under the circumstances I see no objection to the point of law being argued as a matter of indulgence, upon the authority of *Rex v. Holt*, 5 T. R. 436.

WILSON, J.—In civil cases it is well settled that no motion can be made against a verdict for the misdirection of the Judge who tried the cause, unless the party objecting to it brings the objection, which he has to it, distinctly to the notice of the Judge, and he still refuses to amend his direction.

That rule of practice is founded on the plainest principles of convenience and good sense. A Judge may mistake the law, or he may not be aware that some decision he may be relying upon has been over-ruled by a higher tribunal, or he may be mis-applying it by supposing it to be referrible to the facts before him, when it is not so. And if either party think the Judge is in error, he should call the Judge's attention to it, and state his objection to the direction, and why, and in what manner, and to what extent he conceives there is error or mistake.

That is required to permit the Judge to re-consider his direction, and to amend it on the spot if he think he has been mistaken in his view of the law.

If the Judge right himself the cause then proceeds. If he do not, the exception taken is preserved to the party who has taken it, but not otherwise.

Why should not the like rule prevail in a case of this nature as in civil actions, when there are the like reasons for its application in the one case as in the other?

It is said because of the greater indulgence which the law permits to defendants in Crown or criminal proceedings than to parties in civil actions.

Undoubtedly such a rule exists, but to what cases does it apply?

In a capital case if the law had remained as it was for a time, permitting a new trial to be had in as full and ample a manner as in a civil action, it is very probable that a matter of the kind here contended for might be permitted

to the prisoner, and if it were not he would undoubtedly get the benefit of it upon an application to the Crown if it were thought the misdirection at the trial had operated to his disadvantage. But does it follow that the like rule, applicable to a capital case, will in every case apply to a Crown or criminal proceeding merely because it is called so?

The defendant contends it does. The cases on the subject certainly do shew great favour and indulgence have been granted to persons in the like case as the defendant.

In *Birt v. Barlow*, 1 Doug. 171, an action for criminal information in which the plaintiff was nonsuited, a rule to shew cause why the nonsuit should not be set aside was allowed to be moved after the first four days of term, because the Judge who tried the cause desired at the trial the opinion of the Court should be taken on the ground of misdirection in point of evidence. That would not be allowed at the present day.

In *Rex v. Gough*, 2 Doug. 791, was a conviction for perjury. A question of jurisdiction was raised at the trial, and decided in the full Court afterwards adversely to the defendant. At p. 797, it is said after reading the evidence: "The Court observed that from the state of the evidence the conviction appeared extraordinary, and hinted that a new trial would be proper. Dunning said he should have made a motion for that purpose, if he had thought it was competent, after such a long interval of time since the conviction. Upon this Lord Mansfield declared, that it was still competent, because the report of the evidence coming regularly now before the Court, if enough appeared to raise an inclination in them to think the defendant ought not to have been convicted, they could only grant a new trial or postpone forever pronouncing judgment; for that there would be an absurdity in a judgment on a conviction for perjury, where a fine of a shilling should be imposed as the punishment."

In *Rex v. Norris*, 2 Burr. 1189, a conviction for perjury, defendant's counsel at the trial objected to the sufficiency of the evidence, which was then over-ruled. But the learned Judge desired to have the opinion of his brethren upon the point, that the defendant might have the benefit

of the objection, if it should seem to them to have any force in it.

In *Rex v. Holt*, 5 T. R. 436, a criminal information for libel, the defendant was convicted. There was an objection at the trial to the admissibility of the evidence, which was over-ruled. It was admitted then that the defendant had no right after the first four days of term to move for a new trial. But in a case like this the Court would allow it as a favour which was done.

Lord Kenyon, C. J., said, p. 438: "I well remember the case of *Rex v. Gough*, where the objection to the verdict was taken by the Court themselves, who thought that substantial justice had not been done. And there are not wanting other instances of the same kind, where the Court in criminal cases have shewn themselves anxious to be satisfied whether or not the defendant had been properly convicted, without any motion of the party for that purpose. This was done by Lord Mansfield in *Rex v. Morris*, 2 Burr. 1189, and the same has often occurred in other cases."

In *Rex v. Waddington*, 1 East 143, the Court declared they would still arrest the judgment on a criminal information if there was ground for it, although the defendant waived his right to do so; for that the Court would inflict no punishment if there was no offence.

In *Rex v. Teal*, 11 East 307, a conviction on indictment for conspiracy, it being too late to move for a new trial, the Court would not grant the defendant a rule for that purpose, but said: "They would hear any arguments which he had to suggest upon the report, in order to satisfy them in the performance of their own duty, that justice had not been done upon the trial; and if they were of opinion, on hearing those arguments and considering the learned Judge's report, that there ought to be a new trial, they would, of their own accord, award it."

I have not had time as fully to examine the cases as I should have liked to have done; but the conclusion I have come to is this: that the defendant, having taken no objection, as he should have done at the trial, and not having

raised it in moving his rule, and not then intending to do so, is not entitled to have the rule made different from what it is; but the Court may permit the defendant to argue the matter for the benefit of the Court, not as of right, but as a favour granted to the defendant in cases of this nature.

December 7, 1877. *Bethune*, Q. C., and *Delamere* shewed cause to the rule for a new trial. If it were necessary for the prosecution to have proved malice it has been done. Malice can be gathered from the articles themselves. It is also manifest from Cubitt's evidence, for he told defendant before the issue of the articles in question that portions of them were untrue. The evidence was rightly rejected on the authorities, and the charge of the learned Judge is unobjectionable. What he said was only a strong observation on the nature of the evidence, not a direction to the jury how to find. But at all events the objections were not properly taken at the trial; they were not pressed upon the Judge and it is not open to the defendant to avail himself of them now. They cited *Henwood v. Harrison*, L. R. 7 C. P. 606; *Purcell v. Sowler*, L. R. 1 C. P. D. 781; *Cox v. Feeney*, 4 F. & F. 13; *Holliday v. Ontario Farmers' Mutual Ins. Co.*, 1 App. 483; *Dickeson v. Hilliard*, L. R. 9 Ex. 79; *Regina v. Gray*, 1 E. & A. 501; *Russell on Crimes*, 5th ed., vol. iii. p. 189, 190; *Wright v. Doe d. Tatham*, 4 Bing. N. C. 489.

Robinson, Q. C., and *McCarthy*, Q. C., contra. The evidence should have been admitted in connection with the charge that Mr. Simpson was the most corrupt man in Canada. If the letter had been admitted it might have been shewn what use was to be made of the money asked for and that a corrupt use was intended. The letter was rejected and the defendant therefore was not allowed to prove what the prosecutor did or said in consequence of or in answer to it. It was sworn on the argument for the information that defendant relied on this letter as an important element in his defence. The article of the 5th of November is referred to in the subsequent article and con-

nected with it, and it should have been admitted. The charge of the learned Judge was wrong in the matter pointed out by the amendment, and there should be a new trial. They cited *Henwood v. Harrison*, L. R. 7 C. P. 606; *Toogood v. Spyring*, 4 Tyrw. 582, and other cases cited in it; *Turnbull v. Bird*, 2 F. & F. 508; *Hunter v. Sharpe*, 4 F. & F. 983; *Kelly v. Tinling*, L. R. 1 Q. B. 699; *Roscoe's* N. P., 13th ed., 285; *Davis v. Stewart*, 8 C. P. 482; *Hedley v. Burlow*, 4 F. & F. 224.

February 4, 1878. HARRISON, C. J.—I am of opinion that the learned Judge submitted the case to the jury under the plea of not guilty as favourably to the defendant as the law admits.

I am also of opinion that the finding of the jury is in accordance with law and evidence, and ought not to be disturbed, unless there was some misdirection, such as alleged in the rule.

The rule alleges misdirection, as to the pleas of justification, and improper rejection of evidence tendered by the defendant.

The learned Judge in substance told the jury that the defendant, under the pleas of justification, was bound to shew the truth of the whole of the libel to which the plea is pleaded, and that, in his opinion, the evidence fell far short of the whole matter charged.

Such a direction is not so much a direction on the law as a strong observation on the evidence, which may be made in a proper case without being open to the charge of misdirection: See *Regina v. The Port Perry and Port Whitby R. W. Co.*, 38 U. C. R. 431.

But assuming it to be open to the objection of misdirection, I am of opinion there was no misdirection.

It is a good defence to any indictment or information for the defendant to plead "the truth of the matters charged" by way of justification in the manner required, in pleading a justification to an action for defamation, accompanied by the allegation that it was for the public

benefit that such matters should be published : Consol. Stat. U. C. ch. 103, sec. 9.

When an action is brought for a libel, to make a good plea to the whole charge the defendant must justify everything that the libel contains which is injurious to the plaintiff: *Helsham v. Blackwood*, 11 C. B. 111; *Gibb v. Shaw*, 18 U. C. R. 165; *Fitch v. Lemmon*, 27 U. C. R. 273; *Davis v. Stewart et al.*, 18 C. P. 482; *Davis v. Stewart*, 29 U. C. R. 441; *Canada Life Ass. Co. v. O'Loane*, 32 U. C. R. 379; *Alexander v. North Eastern R. W. Co.*, 6 B. & S. 340.

This rule fully applies where a plea of justification is attempted to an indictment or information for a libel: *Regina v. Moylan*, 19 U. C. R. 521.

It follows that if the defendant has in the article complained of, either in a civil or criminal proceeding, stated more than he can allege to be true, or substantially prove to be true if alleged, he may be found guilty of libel: *Regina v. Newman*, 1 E. & B. 558; *Regina v. Gowan*, 7 C. P. 136; *Prior et al. v. Wilson*, 1 C. B. N. S. 95; *Gwynn v. South-Eastern R. W. Co.*, 18 L. T. N. S. 738.

It is only, I think, necessary to read the libels and the pleas of justification in connection with the evidence given at the trial, to discover that the latter, in several particulars, fails to support the pleas.

The charge in the first count contained, is in reference to some person "who purchased three votes at the time of the crisis." That person is distinctly stated to be "the Hon. John Simpson, President of the Ontario Bank." The "evidence," it is said, was secured in this way: "Mr. Simpson boasted to different parties, without even asking if they would accept of the confidence, of having bought these votes and paid as high as \$30,000 for them." The writer, after stating that he at first doubted the truthfulness of the boast, but finding that "the same story" had been repeated by him, alleges that he, the writer was at last led "to institute a search," knowing that "if Mr. Simpson *bought these votes* at such prices *more* had been purchased." The writer

concludes by saying that the result of the search was the substantiation "*of the fact of the purchase by Mr. Simpson,*" and the others named in the charge by other parties.

The writer, very plainly, it seems to me, draws a distinction between the charge and the evidence to support it. The former was that of Mr. Simpson having purchased votes. The evidence of it was his own boasting, which at first was looked upon as a "bit of swagger," but upon investigation there was substantiation of the *fact* of the purchase by Mr. Simpson.

We must, therefore, in considering the evidence given at the trial in support of the charge, be careful not to confound the two by substituting the evidence for the charge, or *vice versa*.

It appears to me there is absolutely no evidence that Mr. Simpson, either alone or with others, purchased three or any other number of votes, or that he ever said *he* did, and no pretence whatever for the allegation which gives great weight to the charge that there was a search instituted which was rewarded in the substantiation of the fact of the purchase.

The evidence of Mr. Cubitt, I think, falls short of supporting the first part of the libel, and there is not a shadow of testimony in support of the alleged investigation resulting in substantiation of the charge.

The libel in the second count contained starts with the knowledge of the fact that Mr. Simpson had telegraphed to a newspaper "that he never spent a dollar in his life to purchase or secure a vote of a member *or an elector* (something beyond the original charge.) The writer ridicules this denial by the exclamation "tell that to the marines!" And in support of the apparent enlargement of the charge says, "Who sent the \$2000 to Clarke at the time of the Blake-Milne election? And who is it that still holds a claim of \$800 for money spent at that time?" This is followed by some general words to which I shall hereafter refer.

My learned brother and myself are agreed that there is

no evidence that Mr. Simpson sent \$2,000 to the township of Clarke at the time of the Blake-Milne election, or that he holds any claim of \$800 for money spent at that time.

The proof as to the charges in the second count therefore fails.

The charge made in the publication set forth in the first count, and persisted in after denial by Mr. Simpson in the publication set forth in the second count, of purchasing members of Parliament at a time of a grave political crisis, is one of the most serious that could well be preferred against a senator or other public man of the Dominion, and when attempted to be justified should be supported by evidence having some direct relation to the odious nature of the charge; but the evidence which was adduced at the trial, in my opinion, not only failed to cover it, but to approach it.

The observations of the learned Judge at the trial as to the pleas of justification both as to the first and second count were, in my opinion, justified by the very slim character of the evidence adduced at the trial on the part of the defence.

Then as to the alleged rejection of evidence "in refusing to receive evidence of a letter alleged to have been written by the Honourable George Brown to the private prosecutor inviting him," &c., and "in refusing to receive evidence of the publication by the defendant of an article on the 5th of November, 1875, referred to in the alleged libellous publication," &c

The issues raise an enquiry involving bribery and corruption on the part of the Honourable John Simpson.

The publication contained in the first count charges him, according to my reading of it, with having purchased three members of Parliament at the time of a political crisis, and avers that the evidence of it is his own boasting on more than one occasion. This, in my opinion, is the charge distinctly made by that publication, unembarrassed by the surrounding of mere words of general abuse.

The publication contained in the second count, in consequence apparently of the broad terms of Mr. Simpson's

denial therein mentioned, goes further, and indirectly alleges or suggests two distinct acts of improper use of money in the bribery of *electors*, and follows these by the general conclusion that the writer was "compelled to look upon Mr. Simpson as one of the most corrupt men in Canada." In order, however, that these and similar general words may not be mistaken for the principal charge, the writer proceeds, "but *our charge* at this time is, that he bought up members of the Commons to defeat Sir John Macdonald's government at the time of the crisis in 1873; and we are not going to let *side-issues* or *general statements* draw attention from *this one fact*."

The substantive charge, deliberately made and deliberately persisted in, is, the purchase of members of the House of Commons by Mr. Simpson, supported by some minor charges suggested in the second article, and followed by a statement of the effect or supposed effect of these charges upon the mind of the writer, resulting in language of general abuse.

The special plea to each count is, that the matters charged against defendant "are true in substance and in fact," and that their publication was for the public interest.

I doubt if under this plea any thing more was in issue than the specific charges of bribery imputed to Mr. Simpson, but conceding the contrary to be the case—that is, supposing the allegation that Mr. Simpson "is one of the most corrupt men in Canada," to be a material part of the issue—I cannot understand on what principle the letter from Mr. Brown of date 15th August, 1872, even supposing it to be capable of the construction for which the defence argue, is to be held evidence material to that issue.

Letters written to Mr. Simpson by third persons, unaccompanied by proof of something done by Mr. Simpson in pursuance of such letters, ought not to be received as evidence against Mr. Simpson. See *Wright v. Doe d. Tatham*, 4 Bing. N. C. 489. There was no evidence tendered of anything *done* by Mr. Simpson in pursuance of the letter

from Mr. Brown. The rule *nisi* does not complain of the rejection of any *such* evidence, if tendered. The only complaint is, that the letter of Mr. Brown to Mr. Simpson was not received. The letter under the circumstances was, in my opinion, rightly rejected.

Next, as to the refusal to receive the publication by defendant of 5th November, 1875. I cannot imagine in what manner defendant supposed this publication would be of any service to him. Its only legitimate effect, if it could have any effect on the issue, would be to prejudice the defendant on his trial for the two libels then properly before the jury. The Court refused to allow an information to be filed as to that publication; but still the defendant insists that it was his right to have it before the jury, merely because it was in some manner related to, and connected with the libels upon which he was being tried.

The objection is one of the strictest sort, unaccompanied with any pretence of merit, but still we must consider and dispose of it on the present application.

In *Tabart v. Tipper*, 1 Camp. 350, Lord Ellenborough held that in an action for a libel upon the plaintiff in his business as a book-keeper, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, might adduce evidence that the supposed libel was a fair stricture upon the general run of the plaintiff's publications.

In *Finnerty v. Tipper*, 2 Camp. 72, Sir James Mansfield held that in an action for libel the plaintiff cannot give in evidence other libels published concerning him by the defendant, unless they directly refer to the libel set out in the declaration.

In *Rex v. Lambert et al.*, 2 Camp. 398, Lord Ellenborough held that on the trial of an information for a libel in a newspaper, the defendant has a right to have read in evidence any extract from the *same* copy of the newspaper which was upon the same topic as the libel, or fairly connected with it, although locally disjointed from it, for

the purpose of shewing the intention and mind of the defendant at the time of the publication of the alleged libel.

In *Thornton v. Stephen*, 2 M. & R. 45, Lord Denman, after referring to the preceding case, held that in an action for a libel contained in a newspaper the defendant has a right to have read as part of the plaintiff's case another part of the *same* copy of the newspaper referred to in the libel sued upon.

In *May v. Brown*, 3 B. & C. 113, it was held that in an action for a libel the defendant cannot, either in bar of the action or in mitigation of damages, give in evidence other libels published of him by the plaintiff not distinctly relating to the same subject.

In *Watts v. Fraser*, 1 M. & R. 449, 7 C. & P. 369, Lord Denman held that in an action for libel previous libels of the plaintiff, shewn to be the provocation of that charged, are admissible in mitigation of damages.

In *Tarpley v. Blabey*, 2 Bing. N. C. 437, it was held that in order to the admission in evidence of libels by the plaintiff in mitigation of damages, it must be shewn with precision that such libels relate to the libels by the defendant.

In *Watts v. Fraser*, 7 A. & E. 223, it was held to be of the essence of such a right on the part of the defendant to give some proof of the plaintiff's libels having come to the defendant's knowledge.

In *Hedley v. Barlow et al.*, 4 F. & F. 224, in an action for a libel published by the defendant in the issue of a newspaper, dated the 3rd of May, 1864, it was held by Cockburn, C. J., after consulting Blackburn, J., that the defendant had a right to read as part of the plaintiff's case other matter in the same issue of the newspaper, and connected with the alleged libel.

This, the last case on the subject, it will be observed, carries the law no further than it was previously laid down in *Rex v. Lambert et al.*, 2 Camp. 398, and in *Thornton v. Stephen*, 2 M. & R. 45, already mentioned.

Not one of these cases, for some of which I am indebted

to the industry of my learned brother, in my opinion goes far enough to sustain the contention of the defendant.

The contention, as I understand it, is, that in an information for two libels published by the defendant, a newspaper proprietor, in two several issues of his newspaper, each of which libels is clear in itself, without extrinsic aid of any kind, the defendant may, without any suggested purpose of benefit, give in evidence a third libel previously published by himself on the same prosecutor in an entirely different issue to either of those in which the libels in respect of which he is sued, appeared, because one of the latter in some manner refers to the libel proposed to be put in evidence.

With all due respect for the contrary opinion, I am unable to bring my mind to the conclusion that this contention is well founded.

If the exercise of such an assumed right were permitted in this case, the effect would have been that the jury would have had before them the very libel in respect to which the Court declined to allow a criminal information to be filed against the defendant

If a particular libel, the subject of a criminal prosecution, were on its face so connected with a preceding publication as to make reference to the preceding publication necessary to the correct understanding of the libel proceeded on, there would be some reason in the contention, whether there is authority to sustain it or not, that the preceding publication should be received whether tendered by prosecution or defence, but this obviously is not the present case.

It is singular that defendant, if believing that the testimony rejected supported the defence, did not make some effort to adduce it as a part of the defence, instead of attempting to have it received after the close of the defence.

It looks as if defendant was not in earnest in tendering the evidence in aid of the defence, and this I am informed by the learned Judge was his impression, for he says that "he did not understand that the reception of the evidence was pressed."

This of itself, according to the cases, would be sufficient to dispose of the application for a new trial on the alleged ground of the improper exclusion of evidence, even if the evidence were beyond question admissible. See *Whitehouse v. Hemmant*, 27 L. J. Ex. 295; see further, *Ferrand v. Milligan*, 15 L. J. Q. B. 103.

It is, as said by Pollock, C. B., in *Whitehouse et al. v. Hemmant*, 27 L. J. Ex. 295, 297, not uncommon for a party at a trial to tender evidence with no idea of pressing its reception, and merely to produce a certain effect.

The same learned Judge, in the same case, said, p. 297: "If a party intends to take advantage of the rejection of evidence, he should press its reception, and make the Judge distinctly understand that he does do so. It would be unfair to allow a party to obtain all the advantage of the rejection of a piece of evidence, without running any of the risk of its reception."

In every view, it appears to me, the application for a new trial fails.

WILSON, J.—The libel charged in the first count begins in this manner: "The party referred to by us as the head of a public institution, who purchased three votes at the time of the crisis, is the Hon. John Simpson, president of the Ontario Bank."

That statement refers to some previous occasion on which the defendant had written on the subject. Where does that previous reference relate to? Is it contained in any paper which was tendered at the trial and rejected?

The libel in the first count then proceeds: "Our evidence in the case was secured in this way: Mr. Simpson boasted to different parties," &c.

The effect, therefore, of this count is, that the defendant charged Simpson with buying these votes, *because he had boasted of having done so.*

Was that charge proved by the evidence?

The second count states that Simpson had telegraphed to the *Ottawa Free Press* "he never spent a dollar in his

life to purchase or secure a vote of a member or an elector on behalf of himself or any other party. There are many in this riding will say, tell that to the marines."

So far that imputes to Simpson a falsehood in the denial he makes, or, in other words, it imputes to him, by reason of that falsehood, that he did do the acts he denies.

The count then proceeds: "Who sent the \$2,000 to Clarke at the time of the Blake-Milne election, and who is it that still holds a claim of \$800 for money spent at that time? Were we allowed so wide a scope as to prove that Mr. Simpson had been guilty of corruption, we should have no trouble in fastening abundance of it upon him. Indeed, we are compelled to look upon him as one of the most corrupt men in Canada; but our charge at this time is, that he bought up members of the Commons to defeat Sir John Macdonald's government at the time of the crisis in 1873."

Here the charge is in direct terms, not that Simpson boasted of having bought up members, but that he had bought them up, and the general tenor of the article on which that charge is made, accuses him as well of having bought them up as of boasting that he had done so.

The evidence disproves all about the \$2,000 and \$800.

The rest of the article is, that he was guilty of great corruption: that he was one of the most corrupt men in Canada; and that he had bought up members of the Commons.

As to the charge of buying up members, or of boasting of it, Mr. Cubitt said that Mr. Simpson stated that *they* had a great deal of trouble in getting the voters over. By *they* I understand the party at that time opposed to the administration, of which Mr. Simpson was one. It does not mean that Simpson had bought the members.

Mr. Cubitt further said Mr. Simpson stated, "we had to pay the money," and Mr. Cubitt also says he understood that *we* meant the bank of which Mr. Simpson was the president, and that what Simpson said was to the effect that, "we had to pay the money to pay off the mortgage." That is a mortgage which one of the members had on his

property, which had to be paid off as the condition of his voting against the then administration.

He also said that Simpson stated, "and we had to pay in advance the money."

Assuming that to be so—that is, that the party to which Mr. Simpson belonged bought the members, and *we*, the bank of which Mr. Simpson was president, "had to pay the money," either then, or, what is more probable, at a later time—then there is evidence that Simpson assisted in buying these members, although he did not buy them, that is, was no party directly to the contract of sale and purchase.

That there was some transaction of buying members in fact or spoken of as a fact, is plain from Mr. Simpson's evidence. He said there were rumours on his return to Ottawa, just after the administration had been defeated, "much talked of amongst the members after my return—of the money. I think the rumors were of offers of money not paid. I think the \$20,000 referred to a Mr. Jones. There was a rumour that Mr. Jones had been offered something, and somebody said \$20,000." He also said "I think I may have stated that great difficulty existed as to procuring the votes of the Prince Edward Island members, for I had heard that not only had \$7,000 been offered to one member, but that \$20,000 had been offered. I had heard such rumours, but I can hardly say by which side."

Such fact is also to be inferred from Mr. Simpson admitting "I may have said the maritime members were great scoundrels or damned scoundrels. I think it must have been the Prince Edward Island men I would have referred to in the terms, if I did."

It appears also from the evidence given by the present Lieutenant-Governor of Ontario, "if the members of Prince Edward Island went with us, (the then opposition) we calculated we would have a majority, and if they all should go with him, he (Sir John A. Macdonald) would have a majority. There were six members in all from Prince Edward Island."

Mr. Simpson also said : "I said something of the whole issue hanging on the members from Prince Edward Island."

From the evidence there was what is called a political crisis. The contest was, whether the then administration would or should be sustained or defeated.

If defeated there would, it was believed, be a change of administration, a term well known and properly used, by which the then opponents of the administration would, most probably, be brought into office.

The contest depended, it is said, upon the votes of the six Prince Edward Island members. Great efforts must have been used to make sure of these members, for Mr. Simpson stated "I think I may have stated that great difficulty existed as to procuring the votes of the Prince Edward Island members, for I had heard that not only had \$7,000 been offered to one member, but that I had heard that \$20,000 had been offered. I had heard such rumours, but I can hardly say by which side." The then opposition party must have got these votes, if the result of the voting depended upon them, because that party on the vote then depending and taken defeated the administration.

There is reason to believe, when there was so much difficulty in getting over members, and so much talk of money in connection with it, and so much depended upon these members being won over, and they were won over, and they were called damned scoundrels for their conduct, that money in some form may have passed, or may have been bargained for upon the occasion.

All that may have been without in the least affecting Mr. Simpson, and from the evidence it is certain he was not in Ottawa at the time, and had no part in any of these transactions. They were all over before he got back to Ottawa. If he is to be affected at all by what then took place, it is by his bank having paid the money, or some part of the money, in the fulfilment of that sale and purchase.

Mr. Simpson denies that he or the bank ever paid any money for such a purpose. I am not questioning his word. The question I am considering is not whether he or Mr. Cubitt is to be believed as to the statement of Mr. Cubitt,

that Simpson declared "the bank had to pay the money." I am considering only, whether, with that evidence given by Mr. Cubitt, although totally denied by Mr. Simpson, it can be said there was no evidence to sustain the justification of the libel in the first count charged, as the learned Judge told the jury.

If the bank, of which Mr. Simpson was president, paid the money—and that is what Mr. Cubitt says Simpson declared was the fact—then Simpson knew of it being paid for such a purpose. If he knew that, it was then a question for the jury, whether he was or could be so far separated from the bank in that transaction, that they could find he had not individually, either as an officer of the bank or otherwise, anything to do with such payments which Mr. Cubitt refers to; or whether he was, or could be connected with that payment?

According to Mr. Cubitt's evidence, Simpson certainly boasted of members having been bought over, and of the bank, of which he was president, having paid or having to pay the money, and that he knew of it being paid or having been paid for that purpose.

Is that evidence of the charge that Simpson boasted of having bought the members? If the bank paid money for such a purpose, it never could be recovered by the bank, because of the immoral nature of the payment; and those concerned in the business might all be said to have been parties in the buying of the members. They would all, in law, be equally guilty.

In my opinion, there was evidence to go to the jury on the plea of justification to the first count.

On the second count, so far as the charge relates to buying up members, I entertain the same opinion I have expressed with respect to it upon the first count.

Upon that count the defendant, by his plea, had undertaken to prove Mr. Simpson to be a corrupt man, or the most corrupt man in Canada, as he says.

For that purpose he proposed to read the paper published by the defendant on the 5th of November, 1875, on which

the prosecutor applied to the Court to be allowed to file a criminal information, and which the Court after cause shewn refused to allow.

If that is the paper which is referred to in the one of the 12th of November, from which the libel in the first count is taken, and which is referred to in that count in this manner: "The party referred to by us as the head of a public institution, who purchased three votes at the time of the crisis, is the Hon. John Simpson, President of the Ontario Bank," I think it was admissible as a part of the libel, and as a part of the plaintiff's case: *Hedley v. Barlow*, 4 F. & F. 224, 228; *Thornton v. Stephen*, 2 Moo. & R. 45; *Rex v. Lambert*, 2 Camp. 398.

It does appear to me also the defendant was at liberty to put in evidence the letter of Mr. Brown to Mr. Simpson, and which the latter in his evidence called the "Big Push Letter," for the purpose of proving any of the charges in the second count, as, for instance, that the prosecutor was a corrupt man, or was the most corrupt man in Canada, if the letter could possibly prove any such matter, not because Mr. Simpson merely received such a letter, because he cannot be answerable for that, but because when he was charged with not repudiating, but with answering, that letter on his application for the criminal information, he did not deny it when he might have done so.

And I am also of opinion that the defendant was at liberty to prove, in support of his justification of any of the alleged charges of libel, the fact that the matters contained in the publication of the 5th of November, reflecting upon the prosecutor, were not considered by the Court, upon the application by him for a criminal information, sufficient, upon the case which he made out then, to entitle him to the relief which he asked.

The charges contained in that paper were, in my opinion, some evidence of corruption against the prosecutor.

I do not say for a moment that if the paper and the letter had been admitted that any different result should have followed than a verdict against the defendant. I

only say that in strict law the defendant had certain legal rights, which, to his disadvantage, he was excluded from exercising.

The defendant had the right to refer to such documents as a matter which was in litigation between the same parties, if they contained anything of use to him in his defence in this prosecution. He could have made use of the prosecutor's affidavits in that proceeding if they related to the subject of this prosecution.

So he might refer to the publication of which the prosecutor then complained against the defendant, for the purpose of shewing that if there are any matters there stated shewing, for instance, the prosecutor to be a corrupt man, the Court did not, on the facts there appearing, think fit to interfere.

The defendant must in such case first prove the fact of such application to the Court, and the judgment then pronounced in a formal manner.

If he should have done so, and I think he should, and did not do it (and it does not appear he gave any such proof), then the evidence in question was rightly rejected.

The defendant may also be entitled to make use of the remainder of the materials which he brought before the Court on his application for the criminal information, than those which are now the subject of this prosecution, because they are part of the *res gestæ*, and a document may be admissible and be no proof of all the facts contained in it: *Milne v. Leisler*, 7 H. & N. 786.

In my opinion the defendant would be entitled to a new trial for the rejection of the evidence before mentioned, if he had proved the rule of Court and other proceedings in the cause formally to permit of their use as in the case of a judgment. But even then he would have to shew that he really pressed the evidence which he tendered, and I am not sure he did so. He should not submit to the Judge's opinion. He should, after the giving of that opinion, if he did not accept of it, move against it and have his objection noted.

I find no such entry made, and the learned Judge says the evidence was really not pressed. But I think he is entitled to a new trial because of the direction of the learned Judge that there was no evidence to sustain the plea of justification to the first count.

There was an argument allowed to the defendant beyond the terms of the rule for, the reasons given on the motion of Mr. McCarthy to amend his rule. Mr. McCarthy contended that the learned Judge told the jury that the libel implied malice on the part of the defendant, and that it was for him to repel that inference.

Besides the important fact that the defendant's counsel, at the trial, took no such objection at the time, when, if anything erroneous was stated, it might be corrected, or anything was said which might be misunderstood could have been explained, there is the further fact that the learned counsel would not have refrained from taking it for the benefit of his client if he had thought there was in reality any misdirection or erroneous application of the law.

The note of the learned Judge on that part of the case is as follows. After explaining what is a libel, he proceeded :

"In short, if a defendant can satisfy a jury that the circumstances under which the publication complained of took place, were such as to remove all just imputation of malice, he is entitled to a verdict upon the plea of not guilty. But on the contrary, if the jury are satisfied that the matter complained of is defamatory, and that the circumstances do not remove the just imputation of malice, the verdict should be against him upon that issue."

I gather from this direction that the learned Judge explained to the jury what constituted a libel ; and that he also explained to them, if the article imputed a crime to the prosecutor, that the law would imply malice in the publication on the part of the defendant, and then it lay upon the defendant to shew such circumstances which would remove that *prima facie* inference, and if he did not, that the jury might then find against the defendant.

The Judge may state his opinion whether the article is a libel or not, but he is not bound to do it. And he must, nevertheless, leave it expressly for the jury for them to determine it: *Parmiter v. Coupland*, 6 M. & W. 105.

In *Turnbull v. Bird*, 2 F. & F. 508-523, Erle, C. J., in his charge to the jury said: "There is no doubt that the matter complained of is libellous, and would entitle the plaintiff to your verdict, unless the defendant can establish a defence. Now the law is, that defamatory matter is presumed to be malicious, unless it is published in the performance of any duty, legal or moral, or in the exercise of any right."

But no one would believe that the Chief Justice withdrew from the jury the question of libel or no libel, merely because he gave his opinion that the article in question was a libel.

In *Cox v. Feeney*, 4 F. & F. 13, 19, Cockburn, C. J., said to the jury, "the publication was *prima facie* libellous, and it would be for them to say whether, under the circumstances, it was privileged * * * unless under the circumstances it is privileged, your verdict must be for the plaintiff."

In *Hunter v. Sharpe*, 4 F. & F. 983, 993, the like language is used.

In *Morrison v. Belcher*, 3 F. & F., 614, 618, Cockburn, C. J., said: "The plea of justification, therefore, was not made out."

These references shew that no objection can be made to the direction to the jury.

There is no authority for saying that a misdirection in point of law should not be objected to at the time.

There is authority that if the Judge nonsuit on a point of law, the plaintiff may, without any leave for the purpose, and although he take no exception at the time, move the Court to set it aside: *Hughes v. Great Western R. W. Co.*, 14 C. B. 637, 644.

It is very likely if the Judge were to tell the jury that a simple contract debt was barred by the lapse of two years,

or that a person who was not twenty-one years of age could not be sued for an assault and battery, or the like, that the Court would at once give relief, although no objection had been made to such statement of law at the trial. How much further the rule might be carried, I need not say, but I apprehend that it cannot be said that every mistake in matter of law can be moved against, which is acquiesced in at the trial.

I do not think the matter outside of the rule should, on the merits, prevail.

Upon the second count, the Crown was entitled to a verdict, because the whole of it was certainly not proved, but nevertheless the defendant was at liberty to prove as much of it as he could.

In my opinion, the rule should be absolute for a new trial for the misdirection as to the first count, and also as to part of the second count before mentioned.

ARMOUR, J., having been retained as one of the counsel for the defence was not present at the argument, and took no part in the judgment.

Robinson, Q. C., asked that a judgment should be given so that the defendant could appeal. Upon that *Wilson, J.*, withdrew his opinion.

The rule was therefore discharged.

Rule discharged.

IN THE MATTER OF ARBITRATION BETWEEN THE CORPORATION OF THE COUNTY OF ESSEX (APPELLANTS) AND THE CORPORATION OF THE TOWNSHIP OF ROCHESTER, IN THE SAID COUNTY OF ESSEX (RESPONDENTS).

Drainage works—36 Vic. c. 48, secs. 452, et seq. O—*Arbitration—Report.*

The township of Rochester having determined to construct certain drainage works in the township, under secs. 447–463, inclusive, of the Municipal Act of 1873, procured plans and estimates by a surveyor, who reported that two other townships, Gosfield and Mersea, and Tilbury West, would be benefited, and assessed them for a certain amount, and that certain county roads would also be benefited, for which he assessed the county \$5,000, and a railway company \$200.

Held, there being several municipalities assessed for the work, that there should have been one arbitration between all interested; and an award made upon a reference between the county and the township of Rochester only was set aside.

Held, also, that the county roads, though on a higher level than the township of Rochester, might be charged with a proper proportion of the expense under section 452.

Held, also, that the engineer should report definitely specifying the particular roads benefited, not stating a lump sum for roads generally; but *semble*, that such objection should not be entertained, not having been pressed at an arbitration between the township and the county, at which the amount assessed against roads had been reduced.

Held, also, that the report must state the different lots assessed, and the sum assessed against each, and should state that these sums were in the surveyor's opinion the proportion of benefit to be derived from such drainage.

Remarks as to the proper mode of proceeding in such matters.

June 1, 1877, *Ferguson*, Q. C., for the appellants obtained a rule from Morrison, J., calling on the respondents to shew cause before the full Court in *banc* why the award made in this matter under the Municipal Act of 1873, dated the 18th of May, 1877, should not be set aside on the following, amongst other grounds: 1. That the award is illegal, it appearing (as the fact is) by the report of which a copy is filed, on an appeal from which the award was made, and otherwise, that there were more than two municipalities interested in the matter of the said arbitration, and each of such municipalities should have appointed an arbitrator in accordance with the said Municipal Act, and there should have been but one arbitration in respect of the whole of such matters. 2. That the appellants are

not liable to be assessed as an adjoining municipality, or otherwise, under the said Act in reference to the contemplated drainage improvements mentioned in the award in respect of the roads also mentioned and referred to in the award and report. 3. That the roads, in respect of which it is sought to assess the appellants by means of the proceedings in this matter, are not county roads, so as to subject the appellants to an assessment upon the same in regard to such contemplated improvements, and such roads have never been assumed by the appellants (with the exception of some three miles thereof), and the remainder thereof, embracing some twenty-five miles, is composed entirely of township boundary lines, which should be opened, improved, maintained, and kept in repair by the respective adjoining townships, and not by the appellants. 4. That, even if the appellants are liable to such assessment in respect of the portion of such road that has been assumed by the appellants, the sum mentioned in the award to be paid by the appellants to the respondents is vastly excessive, and, at most, should not exceed the sum of \$500. 5. Or why the matter of the said award should not be remitted to the said arbitrators, or to such person or persons as to the Court may seem proper, for reconsideration or redetermination on the grounds herein mentioned or referred to, or some of them. Or why the Court should not modify the said award, as the justice of the case may seem to the Court to require. And upon the several grounds disclosed in the notice of appeal served upon the respondents, and on grounds disclosed in the affidavits and papers filed.

The report of the engineer and surveyor was as follows:—

To the Reeve and Council of the Township of Rochester.

GENTLEMEN:—In compliance with instructions received from the clerk of your municipality, requesting me to survey the river Ruscom drain, make estimate and assessment for the construction thereof.

I beg leave to say that I made said survey, estimate, and assessment, and report thereon as follows:—

I took a chain of levels in the river Ruscom from the Gosfield town line to the point where it crosses the sixth concession line in Rochester, a distance seven and three-quarter miles nearly.

In that distance I find a fall of thirty feet three inches, that is, in the bottom of the stream, and from the natural surface at the town line the fall will be thirty two feet three inches.

I then surveyed the east branch of the Ruscom from the Mersea town line to its junction with the main stream at the Malden road, a distance of two miles and a half nearly, and find a fall of twelve feet in said distance.

The east branch crosses the line of the 6th and 7th concessions six times. Consequently I propose to cut the drain straight on the west side of the road allowance as far north as the Malden road, thence west on the south side of the Malden road to the main stream, making the distance much shorter than it would be by following the tortuous windings of the stream; besides, the road will be made the whole length of the east branch.

The estimated cost for constructing a drain twelve feet bottom from the Gosfield town line to the Malden road, and twenty feet bottom from the Malden road to the mouth, together with the east branch having an eight feet bottom throughout with cuttings, as shewn in the sections accompanying this report, \$25,037.

I find the township of Gosfield drains nearly 11,000 acres direct into the river Ruscom, and the township of Mersea similarly drains about 9,000 acres into the east branch of the Ruscom, consequently I assess these lands with a fair proportion of the cost of constructing the Ruscom drain.

As to the justice of assessing the lands of a higher level that floods the lower lands of Rochester, I need only refer you to the case of *Rowe and The Corporation of Rochester*.

Some 3,000 acres of the township of Tilbury West will eventually be partially drained into the Ruscom, consequently I assess these lands slightly. I find a large extent of county roads drain directly into the Ruscom, being also roads which could not be made or maintained without ample drainage; consequently I assess the county \$5,000 for the benefit to the said roads arising from the drainage.

The balance of \$20,037 I assess on lands and roads, as per annexed schedule.

The said drain shall be maintained by the several municipalities interested in proportion to the assessment for the construction thereof.

All of which is respectfully submitted.

I have the honour to be, gentlemen,

Your most obedient servant,

(Signed) A. McDONELL,

Amount assessed against the several municipalities and company for the construction of the river Ruscom drain:—

County roads in the county of Essex	\$5,000
Township of Rochester	7,332
Township of Gosfield	6,458
Township of Mersea	5,080
Township of Tilbury West	967
Canada Southern R. W. Co.....	200

Total assessment.....\$25,037

A copy of the report and assessment was served by the township of Rochester upon the county authorities. On the 14th of March, 1877, (which was the first date given in the papers filed,) the county council appointed Solomon Wigle, an arbitrator, on behalf of the county, in the matter of appeal of the county against the assessment made by the township of Rochester for the construction of the river Ruscom drain. That appointment was communicated to Mr. Wigle on the 29th of the same month. On the 19th of that month the county council gave notice of appeal against the said report and assessment on the following grounds: 1. That the petition for the construction of the drain was not signed by the majority in number of the owners, as shewn by the last revised assessment roll to be resident on the property to be benefited in any part of the township. 2. That the county roads so assessed will not be benefited by the drain, or if benefited they will not be benefited to the extent assessed. 3. That the report is not according to the statute, and does not define what portion of such roads, if any, or to what extent they will be benefited, nor

does it point out what roads are meant. 3. That no proper specification of such roads has been served upon the county as required by the statute. 5. That digging such drain, in place of deepening the river, will create great additional expense. 6. That if the roads are liable to be so assessed, they have been assessed too high when compared with the assessment of other property to be benefited by the drain. That, as the report does not shew what lots have been assessed, it does not appear, nor can it be ascertained, if all the lands to be benefited by the drain have been assessed or not. 7. That roads in the said county are assumed by the council thereof, merely for the purpose of giving an opportunity to the several municipalities in the county to expend thereon a portion of the appropriation made every year for roads and bridges by the county council: that a distinct understanding to that effect has always existed between the county council and the several municipalities in the county, and according to that understanding the county was not to be called upon to pay anything towards the improvement of the said roads but the said yearly appropriation. The notice also informed the respondents that the county had appointed Mr. Wigle as the arbitrator for the county, and it required the township to appoint an arbitrator upon its behalf, according to the statute. The township of Rochester appointed Robert Fleck the arbitrator on behalf of the township in the said matter; and these two appointed Michael Arnold to be the third arbitrator. The arbitrators met on the 12th of April, but did no business, and adjourned until the 19th of April. On the day last named, Mr. Crickmore, the counsel for the county, objected to the arbitration, because it should have been a joint arbitration by all the municipalities interested in the matter, and because the county roads were not liable to be so assessed. The arbitrators adjourned until the 16th of May. On the 15th of May the township of Mersea served notice upon the county protesting against the arbitration being proceeded with: that the municipalities of the county of Essex, Mersea, Gosfield, and Rochester had

each appointed an arbitrator; but as the number so appointed was an even number, and as a fifth arbitrator had not been appointed within the proper time, no arbitration could be proceeded with until the Lieutenant Governor had appointed such fifth arbitrator under the Municipal Act of 1873, sec. 281. On the 16th of May, when the arbitrators met, Mr. Crickmore again on behalf of the county urged the objection he had before taken to the arbitration being proceeded with, and he also stated the fact of the notice having been served on the county by the township of Mersea, to the effect before mentioned. Mr. Ouillette, solicitor for the county, stated in his affidavit that the arbitrators over-ruled the objections so taken by Mr. Crickmore, and that the proceedings went on subject to the protest of Mr. Crickmore before taken, and it was said the appellants appeared upon the same without waiving the said protest. In the same affidavit it was also stated "that from the evidence given before the said arbitrators in this matter it clearly appears that the assessment made by the said engineer is against the following roads, namely: The boundary line between the townships of Rochester and Gosfield. The boundary line between the townships of Rochester and Mersea. The boundary line between the townships of Tilbury West and Mersea. The boundary line between the townships of Rochester and Tilbury West. The boundary line between the townships of Mersea and Gosfield. The road known as the Leamington side road in the township of Mersea. And the road known as the eastern division road of the township of Gosfield. That the two roads last mentioned are the only roads which have been assumed by the county council of the county of Essex as county roads, as appears from the evidence given in this matter: that it also clearly appears from the said evidence that if the said two last mentioned roads are improved at all by the construction of the said drain, it will only be a very small portion thereof, namely, about one mile of the Leamington side line, and about two miles of the Gosfield eastern division line, and that to the amount

of \$500 only." The arbitrators made their award on the 18th of May, and awarded as follows:—"We award and determine that the appellants, the said corporation of the county of Essex, shall pay the said respondents for the improvement of the roads of the said county by the contemplated drainage in the river Ruscom and Silver Creek the sum of \$3,000, and that the said appellants shall pay one-half of all the costs in the matter of this arbitration and reference, and the said respondents the other half."

During Michaelmas term, December 4, 1877, *Bethune*, Q. C., and *H. J. Scott*, for the township of Rochester, shewed cause. The township of Rochester took the proper means under the Municipal Act of 1873, sec. 447, to procure and did procure the plans and estimates of the proposed work by an engineer, who also, under the statute, made an assessment of the real property to be benefited by the drain. The township of Rochester has done the whole of the work, and it now requires from the county payment of the amount which the arbitrators have awarded the county should pay for the benefit which the county roads have received from the drainage. The county contends it is not bound by law to pay the sum awarded, because there were at least four municipalities concerned in these drainage works, in which case section 281 provides that "In cases where more than two municipalities are interested, each of them shall appoint an arbitrator, and in such case if there be an equality of arbitrators, the arbitrators so appointed shall appoint another arbitrator, or in default, at the expiration of twenty-one days after such arbitrators have been appointed, the Lieutenant-Governor in council may, on the application of any one of the municipalities interested, appoint such arbitrator." And Essex and Rochester appointed each an arbitrator, and these two a third arbitrator, without regard to the other municipalities, and an award was made. Whether all the municipalities interested in this work should have joined in the arbitration or not, no question

of the kind can now be raised by the county of Essex, because the county named an arbitrator and required Rochester to name one also, which it did, and these two arbitrators named a third, just as if the matter were between these two corporations only; and it was not until they were organized and began their work as arbitrators that their competency to act was disputed, but the objection was then too late. There can be no reason why these two bodies might not agree to arbitrate between themselves, although it may be they could not have been obliged to do so, and as they did so agree the award made upon that agreement should not be disturbed. The respondents, however, contend that the arbitration which was agreed upon was valid, upon the further ground that the matter to be determined by it was a matter which affected only these two municipalities, and in which the other municipalities had no kind of interest. The township of Rochester has paid for the whole work, and desires to have settled how much of that sum the county should pay, not exceeding the \$5,000 imposed upon it by the engineer. The township of Rochester does not desire to increase the charge of \$5,000, nor to cast upon any other municipality any part of that sum which may be deducted from the county. If that sum be reduced the township must lose the sum which is disallowed. In that case no other municipality is interested, and these two bodies can settle the whole matter between them by an arbitration for themselves only. The county objected also that county roads were not assessable for the expense of such a work, for that the county was not an *adjoining* municipality within the meaning of the statute. That objection cannot be maintained. It is also said that the roads for which the county has been assessed are not all county roads, that only two of them are, and that the award must therefore be set aside. But that is not necessarily so, for section 295 authorizes the Court to hear further evidence, or to set aside the award or remit it from time to time to the same or to different arbitrators to be appointed under the Common Law Pro-

cedure Act, or to increase or diminish the amount awarded, or otherwise to modify the award as the justice of the case may seem to the Court to require. And therefore the Court may say how much the sum should be which the county shall pay for the benefit conferred upon its two county roads.

Ferguson, Q. C., and *C. J. Crickmore*, supported the rule. The county, by Mr. Crickmore as counsel, protested at the first and second meetings of the arbitrators against the arbitration being proceeded with, for the reasons before stated, and it was not too late then to do so, although the county may have at first thought they were bound to arbitrate singly with the township of Rochester. The statute expressly provides for all municipalities interested in the one subject being parties to the one arbitration, and here all these municipalities are interested in this work and in the assessment made for it, because each one is to pay its "proportion of benefit" to be derived from the work : Secs. 447, 452 ; so that each municipality is interested in the amount which is imposed upon the others, because the total cost of the work is to be equalized among them according to the benefit each one derives. The sections 447 to 463 apply to persons and companies owning roads as well as to municipalities, and all these persons or bodies must be represented on the arbitration. A county is not within these drainage clauses, but if within their operation then the arbitration which has been had is invalid, for the reason that it has not been carried on under section 281 as before mentioned. The report of the engineer is defective, it should have named the respective lands and roads to be benefited by the proposed work : sec. 447 and also sub-sec. 5 ; but the report does not do so. The roads of the county said to be benefited should have been specially described. Most of the roads assessed as county roads were not shewn to be county roads. If they are to pay for the roads which really belong to the county the sum will be \$500 only, in place of \$3,000 as fixed by the arbitrators. They referred to *Re Montgomery and the*

Township of Raleigh, 21 C. P. 381; *Hacking v. The Corporation of the County of Perth*, 35 U. C. R. 460.

February 4, 1878. WILSON, J.—There was nothing said on the subject of any by-law having been passed by the township of Rochester for the construction of this drain, or for raising money for the payment of the work, or for assessing the property to be benefited by the work, or for determining what property would be benefited by it. There may be such a by-law, I presume there is, but I know nothing of it. If there be no such by-law, the whole of the proceedings in question must be invalid.

The general scheme of the legislative provisions contained in the Municipal Act of 1873, under which these proceedings were taken, sections 447 to 463 inclusive, is, that a township, town, or incorporated village, upon petition for the deepening of any stream, creek, or water course, or for draining of the property described in it, by the majority in number of the owners, as shewn by the last revised assessment roll, of the property to be so benefited, may appoint an engineer or surveyor to examine the locality, and to make plans and estimates of the proposed work, and to assess the property to be so benefited; and if the council approve of the same, they may pass a by-law to carry out the report of the engineer or surveyor; and the persons who are assessed for the work may appeal against the same to the Court of Revision and to the municipal Court of Appeal, as in ordinary cases of assessment.

The whole matter in such a case is carried on within the municipality, and is settled by its own domestic tribunals.

But it may be that "it is necessary to continue the deepening or drainage aforesaid beyond the limits of any municipality." In such case "the engineer or surveyor employed by the council of such municipality may continue the survey and levels into the adjoining municipality, until he finds fall enough to carry the water beyond the limits of the municipality in which the deepening or drainage was commenced": Sec. 451.

Or it may be that "the deepening and drainage do not extend beyond the limits of the municipality in which they are commenced, but in the opinion of the engineer or surveyor aforesaid" (they may) "benefit lands in an adjoining municipality, or greatly improve any road lying within any municipality, or between two or more municipalities." In such case, "the engineer or surveyor aforesaid shall charge the lands to be so benefited, and the corporation, person, or company whose road or roads is or are improved, with such proportion of the cost of the works as he may deem just; and the amount so charged for roads, or agreed upon by the arbitrators, shall be paid out of the general funds of such municipality or company": Sec. 452.

In either of these cases "the engineer or surveyor aforesaid shall determine and report to the council, by which he was employed, whether the deepening or drainage shall be constructed and maintained solely at the expense of such municipality, or whether it shall be constructed and maintained at the expense of both municipalities, and in what proportion": Sec. 453.

"The engineer or surveyor aforesaid, when necessary, shall make plans and specifications of the deepening or drainage to be constructed, and charge the lands to be benefited by the work as provided herein": Sec. 454.

Then "the council of the municipality, in which the deepening or drainage is to be commenced, shall serve the head of the Council of the municipality into which the same is to be continued, or whose lands or roads are to be benefited without the deepening or drainage being continued, with a copy of the report, plans, and specifications of the engineer or surveyor aforesaid, when necessary, so far as they affect such last mentioned municipality; and, unless the same is appealed from as hereinafter provided, it shall be binding on the council of such municipality": Sec. 455.

By section 456 "the council of such last mentioned municipality shall within four months from the delivery to the head of the corporation of the report of the engineer or surveyor, as provided in the next preceding section, pass a

by-law or by-laws to raise such a sum as may be named in the report, or, in case of an appeal, for such sum as may be determined by the arbitrators, in the same manner and without such other provisions as would have been proper, as if a majority of the owners resident on the lands to be taxed had petitioned as provided in the 447th section of this Act."

In this case no part of the drainage work is made or done outside of the limits of the township of Rochester.

The south limit of one of the Rochester cuttings is upon the town line between Mersea and Rochester, and from there it runs northerly into Rochester.

The evidence shews also that the fall of the land is from about the fifth concession of Gosfield and Mersea, northerly through Rochester.

It was not necessary therefore to continue the deepening or drainage into either Gosfield or Mersea, which lie to the south of Rochester; and as they lie upon higher ground, the deepening or drainage could probably not have been carried into these townships, as that is only to be done in order "to find fall enough to carry the water beyond the limits of the municipality in which the deepening or drainage was commenced."

The claim which is made by Rochester against the county is, therefore, not for work done on the county property, but only by reason of the roads belonging to the county being, as it is alleged, "greatly improved," and therefore the surveyor or engineer was authorized "to charge the corporation, whose roads are improved, with such proportion of the cost of the works as he may deem just," subject to the decision of the arbitrators.

I think roads lying on a higher level than the surface of the municipality in which the work is being done may be charged with such proportion of the work which may be just, if, in fact, such roads are greatly improved and benefited by the work proposed to be done.

I think the county roads, if so improved and benefited, are roads belonging to a "corporation," and "lying within

any municipality," according to section 452 and the later sections.

The expression "adjoining municipality" in section 451 has no application here, because that section refers only to municipalities in which it is necessary to do something in order to find fall enough to carry off the water from the township in which the work is commenced, and as the county roads lie above the Rochester level, they could not be and have not been used for that purpose.

But I see nothing wrong in calling a county an adjoining municipality to one of the townships which forms a part of the county.

The two corporations are different bodies. The county may own property besides roads. It may possess an industrial farm, court house, gaol, house of industry and of refuge: Secs. 348 to 355. And if any of these properties are improved by drainage works carried on by another municipal body, why should it not pay for the benefit it receives, and why is it not for all these purposes an adjoining municipality? : *Rex v. Nottingham*, 4 East 208.

The appellants then object that the engineer's report is not according to the statute, and that it does not define what portion of such roads, if any, or to what extent they will be benefited, and that it does not point out what roads are meant, and that no proper specification of such roads has been served upon the county.

In the case of a report of the engineer or surveyor which refers only to lands and roads in the municipality for which he has acted, it must appear that he has assessed the real property to be benefited by the work, "stating as nearly as may be, in the opinion of such engineer or surveyor, the proportion of benefit to be derived by such deepening or drainage by every road and lot, or portion of lot": Sec. 447. See also section 448, and the form in which such value or benefit should appear, which is as follows :—

CONCESSION.	LOT OR PART OF LOT.	ACRES.	VALUE OF IMPROVEMEN
	5	200	\$ 75 00
	S. $\frac{1}{2}$ 6	100	50 00
	N. $\frac{1}{4}$ 6	50	30 00
	S. W. $\frac{1}{2}$ 8	100	80 00
	9	200	150 00
10	S. $\frac{1}{2}$ and } 10 N. $\frac{1}{4}$ }	150	90 00
			<hr/> \$475 00
Chargeable to Municipality for roads (or lands, or roads and lands).....			120 00
			<hr/> \$595 00

It will be observed that while the lands of private persons are specifically stated which are charged to be benefited, and the value of that benefit to the particular property is also given the benefit to the *roads* or *lands* or *roads and lands* of the municipality is stated generally in these terms without saying where they are, or if roads what length they are, or if lands how many acres there are, and without saying how much is charged upon the roads, and how much upon the lands for the supposed benefit given.

It may be said that so long as the municipality which alone is interested is taking such proceedings, it is of no consequence to it to have more precise information. But that, I do not think, is a sufficient answer to the objection of the generality of the statement, and especially when a different municipality is charged.

The purpose of these enactments is to enable the works to be done by distributing the cost of it among the different persons or bodies who or which are reported by the engineer as owners of property which will be benefited by the works.

It is manifest that the cost of the total works must be raised and provided for, and that is to be done by dividing it among such owners in proportion to the benefit to be derived by each one.

The Act does not contemplate that one person or one municipality will do the work and pay the whole cost of

it, and then claim from the others a share of it, according to the advantages which may then be proved to be given to them.

Such a course of proceeding could not in many cases be taken. No single municipality might be able to make so large an advance, and if it could be made it might not be prudent to do it, because if any deduction were afterwards made from the assessment made against any one or more of these other municipalities, that deduction would fall as a loss upon the one which had made the advance, unless that deduction so made were put upon the others, and that might not happen to be done by the arbitrators.

When the whole matter is confined to the one municipality, the engineer, Court of Revision, or Court of Appeal determines the proportion to be paid by each contributor, and all that is done before the by-law is finally passed, because the law must declare that the council is of opinion it is desirable to do the work.

That being so, each party assessed is interested in knowing the amount the others have been assessed at, and for that purpose they are interested also in knowing precisely what property or roads is or are assessed to enable them to judge of the correctness of the assessment.

Those who appeal may have the assessments of others increased as well as their own diminished, and they may have other property included in the assessment than that which the engineer has considered would be benefited.

Now, there must be a difficulty where so general a statement is made as that *roads* or *lands*, or *roads and lands*, are charged to the municipality at a round sum say of \$120, in the other parties discovering what roads or lands are intended to be covered by that statement. They cannot tell whether other roads or lands of the municipality than the engineer or surveyor intended should be added to the assessment or not, nor can they tell, by reason of such indefiniteness, whether the \$120 assessed against the municipality is a sufficient sum or not.

In my opinion the engineer or surveyor should report

more definitely as to the municipal roads and lands, because the statute requires he shall state as nearly as may be in his opinion the proportion of benefit to be derived "by every road and lot, or portion of lot," and if he put down so much for *roads* or *lands* or *roads and lands* of the municipality, he is not stating the portion of benefit to be derived by *every* road and lot, or portion of lot.

We have here to consider the case of a report of the engineer or surveyor, which is not confined to the one municipality in which the work was commenced, but which extends into roads beyond the limits of the township of Rochester, and which are, I shall assume for the present, county roads.

This report was procured not at the instance of the county, nor had it any voice in or control over it. The engineer or surveyor does not present it to the county, but to the township of Rochester, and by it the county is charged with a sum of \$5,000, which it must either pay or arbitrate upon.

That report, as to the county roads, states, "I find a large extent of county roads drain directly into the Ruscom, being also roads which could not be made or maintained without ample drainage; consequently I assess the county \$5,000 for the benefit to the said roads arising from the drainage." And in the schedule is contained "County roads in the county of Essex, \$5,000."

What roads these are, or what their extent is, is not stated; beyond saying that "a large extent of county roads drain directly into the Ruscom." Neither the locality nor the termini of these roads is or are given.

In the evidence before the arbitrators the roads intended by the engineer or surveyor to be included, as I suppose, in his report are specified; there are seven of them making a distance of $25\frac{1}{2}$ miles.

The county appealed against the assessment and objected to the insufficient description of the roads; still an arbitration was had between the township of Rochester, and an award was made.

I do not see that the insufficiency of the report was pressed by the counsel for the county at the arbitration. The arbitrators did not regard it, and they made their award reducing the amount assessed by the engineer or surveyor from \$5,000 to \$3,000.

The county contend they are not concluded from taking this objection by reason of the award which was made against them. I am not now disposed to give effect to it, unless obliged to do so, as an award has been made on the merits, if it is a valid award in other respects, and as it is in the form of the statutory schedule.

That the roads in question, excepting the eastern division road in Gosfield and the Leamington side line, are county roads, being together about ten miles and a quarter, does not appear to be denied. The rest of the roads charged as county roads are not in fact so, but the county and the other municipalities, for the purpose of devoting to such roads part of the county appropriations annually made for roads and bridges, treat them by some arrangement between themselves as county roads.

The county is entitled to be relieved, therefore, to that extent under any circumstances against the award.

The extent of benefit received by these two county roads by reason of this drainage was stated by Mr. Laird, a surveyor and engineer, called by the township of Rochester, to be \$500, basing that valuation upon the total assessment of \$5,000 against the county in respect of all the roads they were charged with.

The rest of the case may be disposed of on the first ground mentioned in the rule: that the arbitration should have been between all the parties who are to contribute to this work. On the sixth ground mentioned in the notice of appeal, which, in part, covers the same ground, namely, that if the roads are liable to be assessed, they have been assessed too high when compared with the assessment of other property to be benefited by the drain; and also that as the report does not shew what lots have been assessed, it does not appear, nor can it be ascertained, whether all the lands to be benefited by the drain have been assessed or not.

The question then is, as there are several municipalities assessed for this work, should they all have been parties to the one arbitration?

Section 458 enacts that "The arbitrators shall be appointed by the parties in the manner hereinbefore provided by the sections of this Act, with reference to arbitration, and shall proceed as therein directed."

The arbitration clauses are from 277 to 295, both inclusive, and section 281 enacts that "In cases where more than two municipalities are interested, each of them shall appoint an arbitrator, and in such case, if there be an equality of arbitrators, the arbitrators so appointed shall appoint another arbitrator, or in default, at the expiration of twenty-one days after such arbitrators have been appointed, the Lieutenant-Governor in council may, on the application of any one of the municipalities interested, appoint such arbitrator."

There should in this case have been only the one arbitration, and that reference should have been by and between all those parties who were interested in the assessment.

If the scheme of the Act before mentioned be considered, it will be seen how essential it was that all parties interested should have been before the same tribunal in the one cause.

There are five municipalities which have been assessed, and also the Canada Southern R. W. Co.

It is necessary to raise the sum of \$25,037, and the engineer or surveyor has apportioned that sum among the respective bodies he has named in specified amounts. Each one is interested in reducing his own share, and to that end in increasing the shares of the others.

The sum desired to complete the work is to be made up among these bodies or parties "in the proportion of benefit to be derived by such drainage." But if a separate arbitration is to be had between the township of Rochester and any one of the other five bodies, any such sum which may be struck from the assessment of any one of them, say from the county, could not be added to any of the other bodies which were not before the arbitrator, and it should not necessarily be added to Rochester, because that might make the share of

Rochester very far from being in the proportion of benefit to be derived by it from the work. And if that course were adopted in the other separate arbitrations the result might be to tax Rochester beyond all reasonable proportion to the benefit which it derived.

Then again, if on the reference between Rochester and the county, the amount struck from the county assessment were not added to Rochester, but was added to Mersea, which was not before the arbitrators, it might happen when the arbitration with Mersea came on that the sum so added to it might be taken off and added to Gosfield, with or without a further deduction made from Mersea; and when the arbitration with Gosfield came on it might be that these sums were deducted from it because they should have been charged to Mersea; but it would be too late to remedy that, and the required sum for the works could not therefore be made up unless Rochester were to assume it, and it appears the township could not do that so as to make their own people, who would be benefited as owners, pay more than their proportion of the common benefit, and they could not impose the amount upon the general body of ratepayers, because it is a local improvement which the statute has provided the means for specially paying it.

I think, then, the arbitration on the subject of the assessment should have been an arbitration which included all those bodies which were interested in the work, and that all those who are assessed are interested until the respective proportions of assessment have been definitely fixed upon each one of them.

There may still be a further difficulty in some cases, if it can be shewn that some body or person who has not been assessed should have been assessed as a body or person that will be benefited by the work.

That fact may come out in the course of the arbitration, and how is such body or person to be made a party liable to assessment? Must the engineer or surveyor amend his report and make a different re-distribution of the respective assessments, including this new party, or may the

arbitrators report that fact as a matter to be settled preliminary to their proceeding further with the reference, and have the new body or party brought into the arbitration? The statute has not provided for such a case.

I see great difficulty in holding that any other than a general arbitration, to include all those who are interested in the work, can be a due compliance with the statute, or that any other than such a tribunal can possibly determine the rights and obligations of all those who are interested in a common work of the kind in a manner conformable to their respective interests.

And even in the case of an arbitration between two of such bodies by consent, and not properly under the statute, there must still be the difficulty before mentioned; if any part of the charge upon one is deducted, it cannot be put on another body not represented, nor even on the township doing the work which is represented, unless by the further consent of all the owners in that township whose property is benefited, to assume among themselves in some way or other the sum which may be deducted from the other municipality.

We know in this case the arbitrators have taken \$2,000 from the assessment which the engineer or surveyor made against the county, and we see in the township of Gosfield the arbitrators have taken \$3,958 from the assessment of that township, and from what I have said the county assessment should, for the reasons before mentioned, be still further reduced by the sum of \$2,500. These three sums make \$8,458, which are not put upon any other municipality.

If Rochester try to assume that sum it will be found, I think, it cannot do it, as I have just stated. There is no class of persons on which it can be charged over and above the proper burthen of \$7,332, for which the township has been assessed by the engineer or surveyor.

The ratepayers generally will not pay it, because they have nothing to do with it, the work being a local improvement. The owners benefited will not pay it,

because it is beyond the proportion of benefit which they have derived from the work.

It is said the township of Rochester has paid the whole charge for the work, and is now claiming to be recompensed from the other bodies which were assessed for their share of it.

It is extraordinary the township should have finally passed the by-law for the performance of the work until these assessments against the other bodies were finally determined and provided for, and that the work should have been done and paid for before the township knew what sum they could reckon upon, and from whom they were to get their payments. The statute sanctions nothing of the kind, nor is such conduct consistent with ordinary business rules, or with plain common sense.

In the case of a work wholly within the municipality, the by-law is not to be finally passed until an opportunity has been afforded to the owners assessed to appeal against the same, and until that assessment has been finally determined, and "in the event of the assessment being altered by the Court of Revision or Judge, the by-law shall, before being finally passed, be amended so as to correspond with such alteration by the Court of Revision or Judge": Sec. 448.

And it is plain the work cannot legally be commenced until after the by-law has been passed. The course of proceeding in this case should have been conformable to the course of proceedings which are taken in the case of the whole of the matter being confined to the one municipality.

There should be the report of the engineer or surveyor on the work, and his assessment made of the real property to be benefited, and the proportion of benefit which, in his opinion, would be derived by the work by every road and lot, or portion of lot; and if the council thought it desirable to adopt that report, they should pass a by-law to that effect and publish it.

Before finally passing the by-law the owners of property,

if it is a by-law only for the municipality, have then the opportunity to appeal against the assessment if they wish to do so.

And if it is a by-law which affects other municipalities or bodies, which is the case here (if there is such a by-law,) then, before the by-law is finally passed, there is the opportunity given to the owners of the municipality passing the by-law to appeal against the assessments as before mentioned; and there is the duty upon the council passing the by-law to serve the other municipalities or bodies with the copy of the report, plans and specifications, which affords them the opportunity of appealing also against the assessment, if they desire to do so, to the arbitrators to be agreed upon. And when these appeals are all over, and the assessments are finally settled, then the by-law is to be amended to suit the alterations (if any) which have been made by the Court of Revision, or by the Judge, or by the arbitrators, and then it is to be finally passed.

When it is passed, the municipality passing it may raise the necessary amount and proceed with the work, and look to the other municipalities for payment of their respective assessments, as fixed by the engineer or surveyor, or, if appealed from, as fixed by the arbitrators.

The other municipalities must then pass by-laws for raising the sums assessed respectively upon them, and pay the same to the municipality which is doing the work.

I presume it is a matter of detail whether a municipality passes a by-law for raising the whole cost of the work, or only so much of it which such municipality has to pay, and relies upon the payments to be made by the other municipalities for their proportions of it.

If the sum required be large, it might not be convenient for the municipality to raise the whole amount on its own credit.

If the municipality proceed in the manner stated, there never can be difficulty in fixing upon the other bodies or municipalities the proportions they are each to bear, and in knowing beforehand how much of the expense will have to be borne by itself.

Unfortunately that course has not been pursued here. The expense has been incurred, and the parties are now trying to settle how much each of them is to bear of it, a question which comes late in the day, and which renders it a very embarrassing one to decide.

It must also be considered whether, in case the work is confined wholly to a single municipality, and twenty or thirty owners of property have been assessed for it in proportion to the benefit which they will severally derive from it, the appeal from such an assessment to the Court of Revision should be a joint appeal or not.

If not, it may be asked, why should there be a joint arbitration when the assessment affects different municipalities?

The circumstances are alike in both cases. A particular sum has to be raised without which the work cannot go on. That sum is to be paid by a particular number of persons or corporations in proportion to the benefit received by each.

If a deduction is made from one person or corporation, that is so much lost to the required fund unless it is put upon some other person or corporation; but it cannot be put upon such other without notice to that effect. If such notice be given to increase the assessment of such other person or corporation, and an appeal be made from it, the sum added may be taken off or may be put upon some other person or corporation, and so the process may go on, occasioning great confusion; and when the last appellant appears he may be able to resist any addition to his assessment, and may be able to claim a reduction from it, and what then is to become of the sum which must be raised, when so much of it may have been struck off that the work cannot go on, and the deficiency cannot be put upon any one?

No doubt that may be the result, as well when the whole matter is confined to one municipality, as when it applies and extends to several municipalities.

And it all can be avoided if in both cases, when there is an

appeal from any one assessed, all parties to the assessment are at once made parties to the appeal and brought before the Court of Revision or arbitrators, as the case may be.

There is no such difficulty in ordinary assessments, because, however much some of them may be reduced, the sum required to be raised can still be got by imposing a higher rate upon the assessment as finally fixed.

Is it then necessary in every case where a particular sum has to be raised, and to be apportioned in a particular manner among certain persons, that if the apportionment is disturbed by any one of such persons that all who are interested in the matter must be made forthwith parties to the proceeding which seeks to disturb it?

I confess I see great difficulty in safely and effectually carrying out the purpose of raising the defined sum by imposing a distinct portion of it on each one of a certain number of persons, if the appeal of one or more, and a deduction made from such assessment, will have the effect to prevent the required sum being raised, unless the whole of such persons are before the appellate tribunal at the same time, and the several assessment of each one is disposed of by increase or reduction or otherwise, as the case may be, leaving the aggregate sum intact.

That is the method of equalizing the aggregate assessments of all the municipalities in the county without reducing the aggregate amount.

If a sum had to be divided among a class of persons by a scheme which affected every share, all who were interested in the principal fund would have to be before the Court.

In like manner they should, I think, be before the Court of Revision or arbitrators in a case under these sections of the statute.

Instead of the appeal of each one who is assessed, if it is allowable, when the whole matter is confined to the one municipality, being an argument for there being several arbitrations when the matter extends to several municipalities, it is rather an argument that as there is to be a

joint arbitration in the latter case, there should be a joint appeal in the former case.

The municipality, when the matter is confined to it alone may, however, upon the appeal of a single person of those assessed, take such means to insure the preservation of the aggregate sum by arrangement with its own people, which different municipal bodies cannot do, that the rule in the former case should not necessarily govern the proceedings in the latter case. It is no part of our duty now to decide what a municipality may do within itself, as this is not a case of that kind. But in every view of the law and the facts, I do not know how the statute can be properly carried out in a case of the present description without all parties interested being parties in and to the one arbitration.

There remains the further objection that the report does not shew what lots have been assessed, and it cannot be ascertained if all the lands to be benefited by the drain, have been assessed or not, or whether the county roads have been assessed too high as compared with the other property to be benefited by the drain.

The report of the engineer or surveyor, when the whole matter is confined to the one municipality, must put an assessment on the property to be benefited, and it must state as nearly as may be in the opinion of the engineer or surveyor the proportion of benefit to be derived by such drainage by every road and lot or portion of lot, and the schedule before referred to shews with what particularity that must be done, so that each person assessed may have an appeal, if he desire it, from the report to the Court of Revision and Court of Appeal.

When the survey goes beyond the municipality or benefits land or roads beyond it, there is still the same kind of report to be made.

In my opinion the engineer or surveyor must, in case land or roads beyond the municipality commencing the work are to be assessed, assess "every road and lot or portion of lot" according to the proportion of benefit the same, in his opinion, derives from or will derive from the

work. It must be done so that each municipality may understand for what and upon what the assessment has been made, in order to test its own liability, and to ascertain in like manner for what and upon what land or roads the other municipalities have been assessed, that the liability of these other bodies may be determined, in order that a just equalization may be made of the aggregate expense among them all.

It is necessary also that should be done, because the municipalities which are so assessed, after arranging the amounts charged respectively against them with the municipality doing the work by agreement or arbitration, have to pass a by-law, under section 456, in order to tax those persons whose lands have been so benefited within the respective municipalities.

The statute is not very clear on the subject, but that I am of opinion is the meaning of that section, and I presume, although the Act does not expressly say so, that these persons may appeal from that assessment to the Court of Revision or Court of Appeal, as in ordinary cases, to have the assessment more equitably apportioned among themselves, not varying the aggregate amount which the municipality has been obliged to pay or assume.

I think there may be such an appeal before the by-law is finally passed, because it is to be passed in the same manner as if it were passed under section 447, and by that section there is the right of appeal to the Court of Revision and to the Court of Appeal.

Without such a method of assessment it is impossible the rights of the respective owners and municipalities can ever be adjusted.

The report states: "I find Gosfield drains nearly 11,000 acres direct into the Ruscom, and Mersea about 9,000 acres. Consequently I assess these lands with a fair proportion of the cost of constructing the Ruscom drain * * Some 3,000 acres of the township of Tilbury West will eventually be partially drained into the Ruscom, consequently I assess these lands slightly. I find a large extent of county roads drain directly into the Ruscom," &c.

Then the assessment is imposed on each municipality, and on the Canada Southern R. W. Co. in a gross sum as before stated.

If the facts had been just as stated, there could have been no doubt that the report would have been wholly insufficient, yet these are the facts which the papers in this case shew.

But on referring to the schedule, which has since the argument been supplied, from what was said at the argument, it appears that in the township of Rochester each lot has been assessed a particular sum, and the township so much for roads. And in the papers filed in the case between Gosfield and Rochester, there is a schedule shewing that the engineer or surveyor had also assessed each lot in Gosfield for a certain sum, and the township so much for roads.

I do not find any such schedule for the township of Mersea, but no doubt there is one for that township also which can, if necessary, be produced. These schedules are in form as follows :—

Schedule of assessment for the construction of the river Ruscom drain. The township of Rochester—

CON.	LOT.	ACRES.	TOWNSHIP OF ROCHESTER—OWNER	AMOUNT.
33	N. W. part	25 26	146 16	\$38 4
Some others are assessed as follows :—				
4		26	200	\$80
4	N. $\frac{1}{2}$	27	100	50
4	S. $\frac{1}{2}$	27	100	70
4		28	200	150
4		29	200	200
5		26	200	175
6		27	200	220
		25	146	219

The schedule amounts to the sum assessed against the lots, \$6,332, and then is added, "Assessment on roads in Rochester, \$1,000, total on lands and roads in Rochester, \$7,332."

If they had stated, as the statute requires, that these

sums assessed upon the lots were in his opinion "*the proportion of benefit* to be derived by such drainage," or by the owners of them, or if there had been a heading in the schedule, as in the form given by the statute, "Value of improvement," the report, treating the schedules as part of it, would have been perfect.

Now, it is true that these different parcels of land have each been assessed at so much for the construction of the drain; but is that assessment the proportion of benefit, or the value of improvement which each lot receives from the work? There is nothing in the report or schedule to shew it. Can it be inferred, or should it be assumed that it is so?

In a case which was argued before me not long ago, I was of opinion, although no formal judgment was given, that a schedule which stated generally that all property situated on each side of the street which was drained was for a distance of sixty feet back from the street specially benefited, and which valued all the property on that street at \$20 a foot frontage, and put an equal tax upon every foot of frontage, did not shew that all property so valued was benefited or improved to that extent by the drain.

In this case much more than that is done, for the lands are not valued at all. There is *an assessment* put upon each lot, and I think it should be assumed in such a case that the assessment so put upon it is the amount of benefit which it will receive from the works, although it would have been much better to have followed the form of the statute by stating at the head of the column which shews the amount of the assessment that such sums were the amounts or *value of improvement* of the several lots by reason of such work.

This award cannot, I think, be supported, because it should have been a joint award according to the statute, and the nature of the transaction, as has been pointed out, requires that the award should be joint to make it an effectual proceeding and to enable the work proposed to be carried out. We cannot remit it back. If the parties are satisfied that Tilbury West and the Canada Southern R.

W. Co. have each been assessed at their proper amount, and that the residue of the cost of the work is to be made up by the four remaining municipalities, they should agree to have a joint arbitration to settle their respective proportions of payment of that sum, as it is manifestly to their interest to determine this unfortunate state of things, and as it is plain, if Tilbury West and the railway company have been fairly assessed, that the other parties interested must make up the balance among themselves according to the proportion of benefit which each of them has derived from the work.

I incline to think this is not a case for costs, and that the rule should be absolute setting aside the award, because it was not a joint arbitration and award.

HARRISON, C. J., and ARMOUR, J., concurred.

Rule absolute.

FORD V. GOURLAY.

Seduction—Action by master—Damages recoverable.

The plaintiff sued for the seduction of E. L., his servant, who had been in his employment for several years, and while there was seduced by defendant, who had been received as a suitor for her. Her brother had been dead many years, and her father, of whom she knew nothing, had left the country fifteen years before, having married again. The action was brought within six months from the birth of the child, which was not born in the plaintiff's house. Defendant pleaded only not guilty, and that E. L. was not the plaintiff's servant. The jury found for the plaintiff and \$500 damages.

Held, that it was unnecessary to aver in the declaration the death of the parents, or shew such facts as enabled the plaintiff to sue as master within the six months, but that it was sufficient to shew a common law cause of action, leaving the defendant to plead any such defence, which was not admissible under the pleas here. *Lake v. Bemiss*, 4 C. P. 430, dissented from.

None of the special grounds for compensation which may be considered in the case of a parent apply in the case of a master or employer, but he is not restricted to his actual pecuniary loss; the damages recoverable must depend very much on the position in his household of the person seduced, &c.; and in this case the Court refused to interfere for excessive damages.

SEDUCTION of Ellen Ladburry, the servant of the plaintiff, whereby, &c.

Pleas, not guilty, and a denial that the said Ellen was the servant of the plaintiff.

Issue.

The cause was tried at the last Fall Assizes at Berlin before Morrison, J., and a jury.

The evidence was that the young woman had been in the employment of the plaintiff for five or six years continuously at wages: that the defendant paid her attentions for years, and after discontinuing his visits for a while, he resumed them from May, 1876, until November of that year. It was said he seduced the young woman in June of that year, and that carnal intercourse continued from that time until the third week in August. There was also the like intercourse in October. The young woman had a child on the 17th of May, 1877, which she said was the child of the defendant.

There was evidence that she was unwell, and unable to

work for several days in the fall of 1876, and she was attended by the doctor in March, 1877, on account of her being in the family way. She continued in the plaintiff's service until some time in April, 1877, when she left to be confined, and as soon after as she could she returned to the plaintiff's service, where she had remained since then.

Her mother died many years ago; her father left the country fifteen years ago, and got married again, and she did not know anything about him. The plaintiff said he sued because the girl had no parents. The defendant denied the charge.

The jury gave a verdict for the plaintiff, and \$500 damages.

In Michaelmas term, November 23, 1877, *J. K. Kerr*, Q.C. obtained a rule, calling on the plaintiff to shew cause why a nonsuit, pursuant to leave reserved, should not be entered, or a new trial be had on the ground of excessive damages, and that the plaintiff, if entitled to any damages, was not entitled to recover more than such as were actually sustained by him according to the evidence. The ground of nonsuit taken at the trial was, that the plaintiff was not entitled to recover at all, because the young woman was not delivered of her child while in the plaintiff's service.

In this term, February 6, 1878, *Durand* (of Galt) shewed cause. The case of *Westacott v. Powell*, 2 E. & A. 525, shews that an action of this kind will lie before the birth of a child, if any pecuniary damage has been sustained by the mother by reason of the seduction.

J. K. Kerr, Q. C., supported the rule. The child was born in May. The action was brought in June, and the verdict was rendered in September, so that the plaintiff, as master, brought his action too soon, that is, before six months from the birth of the child had elapsed, within which period the parents might have brought the action. And that objection cannot be cured now, because the six months are now completed, and no such action has been

brought by the parent as yet, for the parent may still bring his action. If the master can bring this action, he can recover no greater damages than his actual pecuniary loss; he cannot recover for his injured feelings. He referred to *James v. Hawkins*, 25 C. P. 346; *Green v. Wright*, 24 U. C. R. 245; *Hogan v. Aikman*, 30 U. C. R. 14; *Terry v. Hutchinson* L. R. 3 Q. B. 599; *McKay v. Burley*, 18 U. C. R. 251; *Healey v. Crummer*, 11 C. P. 527; *Anderson v. Rannie*, 12 C. P. 536, 538.

March 15, 1875. WILSON, J.—The evidence shews plainly that the mother of the young woman had died long before the act complained of took place, and that the father left this country fifteen years ago, and it was not known where he was, or whether he was living or not; and that the action was brought by the plaintiff, because the girl had no parents.

On these facts there is sufficient ground for presuming that the father as well as the mother was dead at the time when, &c., in which case this action was well brought by the plaintiff.

If the father were not dead, but was, nevertheless, not resident in the country at the time of the birth of the child, the plaintiff by the statute was still entitled to bring this action by reason of his relation as master.

The evidence further shews facts from which it may be inferred that the father had abandoned his daughter, and had refused to provide for her and retain her as an inmate before the time of her seduction.

If the father be living, or if he were resident within the province at the time of the birth of the child, or if he had not before the seduction abandoned her, such matters should respectively, according to the facts, have been pleaded by the defendant as an answer to the plaintiff's suit. These matters are not in issue under not guilty. It was not incumbent on the plaintiff suing only as master to aver the death of the parents of the young woman, or any of the other circumstances which enabled him to sue in his own right as such master, within the period of six months from

the birth of the child. Nor was it necessary that he should aver that the period of six months had elapsed from the birth of the child before he brought his suit; nor that the parents had not brought an action for the seduction of the young woman before the commencement of his action; because all these matters should come more properly from the defendant by way of defence and answer.

The case of *Lake v. Bemiss*, 4 C. P. 430, which decided that in an action by the mother of the young woman and her second husband for the seduction of the daughter of the first husband, born before the second marriage, the declaration was bad on demurrer, because it did not allege the death of the girl's father, is not, I think, a decision which is warranted by the general rules of pleading.

Where the statute provided that the sheriff should send his precept to the Mayor for the election of a burgess, and if there be no mayor, then to the bailiffs, the pleadings in an action on the statute against the bailiffs for not returning him as burgess, need not aver there was no mayor; for if there were a mayor, it must be shewn by the defendants: *St. John v. St. John*, Hob. 78; and see many other cases mentioned in *Com. Dig.* "Pleader," C. 81, G. 13

The plaintiff has alleged a full common law cause of action. There is nothing else to be tried under not guilty, but whether the defendant committed the wrongful act alleged, thereby causing damage to the plaintiff as the master of the young woman, which that plea admits him to be; and under the second plea, whether the girl was the servant of the plaintiff or not.

The first plea is proved by establishing the seduction by the defendant, and by shewing illness, pregnancy or delivery of a child, resulting from such seduction, and producing loss of service to the plaintiff, who is, by that plea, admitted to be master.

It is impossible therefore that the defendant can raise such questions as the premature bringing of the action by the plaintiff as master before the expiration of six months from the birth of the child, or that the father is living or

is not shewn to be dead, &c., &c., under the plea of not guilty. And as there is no plea which permits such questions to be raised, the defendant is not at liberty to raise, them. If there had been any such matters pleaded, the evidence, in my opinion, would have been sufficient to disprove them.

The only question we require to consider is, whether the plaintiff, who sues only as master, and is not from relationship or by adoption in *loco parentis* towards the girl, is entitled to the like measure of damages which a parent, or one in the place of a parent, generally receives; or whether he is not restricted to such actual pecuniary damage which he, as master, has in fact received?

Damages for the mere seducing away of a servant from the master's employ, must rest upon a different basis than damages which are given for the seduction of a child. In the former case they are regulated by the actual money loss resulting from the act, unless where strong evidence of malice is shewn. And in that case the damages are not limited to the mere time the servant was bound to continue with his master.

Mayne on Damages, 3rd ed. 435-6, and the case of *Gunter v. Astor*, 4 J. B. Moore 12, is referred to.

There the plaintiff was a piano manufacturer. The defendants conspired to seduce away several of the plaintiff's workmen from his factory. The defendants invited the workmen to dinner, made them intoxicated, and induced them to sign an agreement at higher wages to work for the defendants. The plaintiff realised about £800 per annum by the sale of his instruments, and by the defendants' conduct he was nearly, if not absolutely, ruined. The jury gave £1,600 damages, although the men worked only by the piece, and were not bound to serve for any particular time. And the Court declined to grant a rule on the ground of excessive damages.

In *Evans v. Walton*, L. R. 2 C. P. 615, where the plaintiff's daughter, who assisted her father in his business, was enticed away by the defendant and cohabited with him

for several days, the plaintiff recovered £50 damages, although the daughter was not bound to serve her father in his business.

Admitting that there is and must be a cause for great difference in the allowance of damages when the action for seduction of a young woman is brought by the parent, or by one in the place of the parent, and when it is brought by one who is no relative or friend, but merely fills the legal relation of master, it does not follow that the master must be restricted to his simple pecuniary outlay or loss.

It was early laid down, and the rule was considered to be well settled, as was stated by Lord Eldon in *Bedford v. McKowl*, 3 Esp. 119, that in an action by the parent for the seduction of her daughter, the action was brought "for an injury to her child," and "that the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and as the parent of other children, whose morals may be corrupted by her example."

In *Berry v. Da Costa*, L. R. 1 C. P. 331, it was held the jury might be told they might take into consideration, in such an action, the lessened prospect of the young woman being able to marry after her seduction, and the difference there was in her position returning to her mother's home, not a virtuous and respected member of the family, but a disgraced woman. That language cannot be addressed to the jury when the action is brought by the master only.

In *Edmondson v. Machell*, 2 T. R. 4, the aunt recovered exemplary damages for the assault and battery of her niece and domestic servant, because she stood in *loco parentis*.

In *Irwin v. Dearman*, 11 East 23, the plaintiff recovered exemplary damages for the seduction of his adopted daughter and menial servant for the like cause.

In *Howard v. Crowther*, 8 M. & W. 601, the action was brought by the brother for the seduction of his sister and servant. The question there was on demurrer, whether the cause of action passed to the plaintiff's assignee in bankruptcy. There, too, the brother was in *loco parentis*.

It does not appear the learned Judge directed the jury to give exemplary damages. And if he did, no exception was taken to his charge. It was not said in the argument before us that any such charge had been given to the jury.

The rule has been moved, not for any misdirection as to the damages, but merely to the assessment which the jury have made.

We may say that none of the special grounds for compensation or consolation which are properly to be considered in such a case for a parent, or for one in the place of a parent, can be applied to the case of one who is merely the master or employer of the young woman.

But that does not determine the question. The defendant contends that the plaintiff, as master only, can recover no more than his actual pecuniary loss. I cannot assent to that limitation.

The master's house has been violated by the defendant. He was received by the plaintiff as a suitor for the young woman, and he ended by debauching her. The plaintiff himself, it appears, had a daughter at home, who had to do the work of the girl while she was unwell, and while she was absent for her confinement. And the defendant's conduct was injurious to the good name of the plaintiff's household, and may have had a prejudicial effect upon the young women of the plaintiff's family.

It must depend very much upon the position in the household, of the person who is called a servant, what damages should be given.

A mere menial servant who did not in any way associate with the members of the family, or who had been in her place for only a little while, might not, by her seduction, be supposed to entail much loss, if any, upon her master; while a governess associating with the young women of the family, or a respectable girl in a farmer's family in the country, who associated freely and upon almost equal terms with the members of the family, as is usual in such cases, if seduced might, it is evident, cause very serious prejudice in that household in many ways, and much more harm than could be done in the case first put. So the

master might be much more injured by the seduction of a trusted servant who had been brought up in the family, than by one who had served only for a short term.

It is impossible that the like exact assessment is to be made for the master in every case, when a servant, as it is called, has been seduced, simply because it is a servant, without regard to the character and position of the particular servant, and the position and composition of the family in which she is employed, and the social relations that existed between them, and the effect that such a misfortune is likely to have upon the family; and without regard also to the conduct of the defendant in gaining admittance to the household; whether he has not broken the confidence which was placed in him and committed an outrage upon the hospitality which was extended to him, and done his best to bring discredit and disgrace upon the household.

For this peculiar kind of action does not change its character because it is brought by the master and not by the parent. It is still an action *sui generis*, in which grounds of damage may be taken into consideration in estimating the plaintiff's quantum of damage, which are not permitted in other kinds of action. While, therefore, the master cannot recover upon the like grounds as a parent may, he is not, in my opinion, restricted to the return of his mere money loss.

The matters I have adverted to may, in my opinion, be considered by a jury in estimating his damages. I have no doubt the \$500 is a much larger sum than the plaintiff as master, lost in money by the defendant's conduct; but I cannot say it is less than the plaintiff may be entitled to merely as master of the young woman.

The case of *Gunter v. Astor*, 4 J. B. Moore 12, before mentioned, is certainly an authority in favour of the damages which have been assessed.

I think the rule should be discharged.

HARRISON, C. J., and ARMOUR, J., concurred.

Rule discharged.

BURNS ET UX. V. CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Ice on sidewalk—Notice—Negligence—Contributory negligence—Evidence

A sidewalk on one of the streets in the city of Toronto, to the distance of 500 feet, and near the centre of the city, was covered with ice. There was no evidence of any actual notice to the defendants of its existence, but it was proved that the city commissioner, whose duty it was to enforce the city by-laws, one of which required the removal of ice and snow from the sidewalks, had frequently driven up and down the street and past this sidewalk, without taking any steps to enforce the removal of the ice. It did not appear, however, that he ever noticed, or that any complaint had ever been made to him concerning, the condition of the sidewalk. The female plaintiff, while walking over the sidewalk in broad daylight, slipped on the ice and fell, and received a severe injury, but it was proved that she was well aware of the state thereof, as she lived close by, frequently passed over it, and had already passed over it on the day of the accident.

Held, that defendants were not liable.

Per HARRISON, C. J., because the plaintiff was guilty of contributory negligence.

Review of the authorities as to liability for accidents caused by snow or ice.

Per WILSON and ARMOUR, JJ., that there was no negligence on defendants' part, for that there was no proof of notice to them, the mere fact of the commissioner passing along the street being insufficient to raise any presumption of notice; and that there was contributory negligence on the plaintiff's part, for she was well aware of the condition of the sidewalk, and need not have used it.

Per HARRISON, C. J., the default which will render a municipal corporation liable in a civil action for neglect to repair, need not be such as would subject them to indictment. *Ringland v. Corporation of Toronto*, 23 C. P. 93, remarked upon.

THIS was an action for negligence.

The declaration contained two counts.

The first count alleged that the defendants were possessed of a certain street called and known as Sherbourne street, and it was their duty to remove or cause to be removed all snow, hail, and ice from the sidewalks or paths for foot passengers on the said street, to cause the same to be put in a safe condition for foot passengers to walk thereon: that one of the sidewalks on Sherbourne street, aforesaid, being covered with snow, hail, and ice, it was the duty of the defendants to have had the same removed and to cause the said sidewalk to be put in a safe condition for foot passengers to walk thereon, yet the defendants

neglecting their duty in that behalf suffered the said sidewalk to be and remain in an unsafe and dangerous condition for passengers lawfully using the same, whereby the plaintiff Catherine Burns, then being the wife of the plaintiff Patrick Burns, without any default on her part, slipped and fell, and injured her leg, and became sick and wounded and permanently injured.

The second count was similar to the first, with the exception that the husband therein claimed damages for the loss of the comfort and services of his wife, and expense incurred in nursing her and for medical attendance.

The only plea was, not guilty.

The cause was tried before Galt, J., without a jury, at the last Summer Assizes for the city of Toronto.

Patrick Burns, the plaintiff, was a resident of the city of Toronto. He lived on the east side of Sherbourne street a short distance north of what is described in the evidence as Alderman Mutton's lumber yard. The street runs north and south. The lumber yard is situate at the north-east corner of Sherbourne and Queen streets, being about one hundred feet in frontage on Queen street and about five hundred feet in frontage on Sherbourne street. There was a wooden sidewalk on the east side of Sherbourne street along side the lumber yard.

On the 20th of January, 1877, the sidewalk along side the greater part of the lumber yard had a great deal of ice and snow upon it. The female plaintiff on that day when returning to her own house from the St. Lawrence market slipped on the sidewalk and fell. Had the snow and ice been removed she would not have fallen. The snow and ice upon the sidewalk was described as being of several inches thickness. The sidewalk north and south of this place had been kept pretty free from ice and snow. But at this place the evidence for the plaintiffs shewed the ice and snow were entirely across the sidewalk from side to side and had not been cleaned throughout the winter and up to the time of the accident. Several witnesses swore that the snow and ice were allowed to remain on the side-

walk from one snow fall to another, freezing and thawing all winter up to the happening of the accident. Several witnesses not only described the place where the accident happened as being very dangerous to pedestrians, but represented that they themselves had fallen there. One witness described it as being "in a fearful state," and "that it was in such a state that one could scarcely walk over it."

There were witnesses called for the defence who gave testimony to the effect that men had been employed and paid by the owner of the lumber yard to clean the sidewalk, but if the testimony for the plaintiffs were credible these men did their work very badly.

There was also evidence on the part of the plaintiffs that the city commissioner, whose special duty it was to enforce the by-laws of the city for the removal of snow and ice from the sidewalks, had during the winter and up to the time of the accident frequently driven up and down the street and past the dangerous part of the sidewalk without doing anything to compel the removal of the snow and ice, but no actual complaint was made to him about it.

The place in question is near the centre of the city. Many persons reside in its vicinity and along Sherbourne street.

The accident occurred to Mrs. Burns between 4 and 5 o'clock in the afternoon. Living as she did only "four doors" north of the place she frequently passed over it. She passed over it nearly twice every day. She passed over it the morning of the day on which she fell. She well knew the place and that it was dangerous. The evidence did not shew whether or not she could have avoided it by walking in the street, or in what condition the street there was at that time. The question of contributory negligence was not raised at the trial either as a ground of nonsuit or as a question of fact for the decision of the learned Judge. His finding made no reference to it.

Mrs. Burns by the fall suffered a severe sprain of her right ankle. It was described by the medical man who attended her as being a very bad sprain and one which was

more painful than a fracture. The ligament of the outer side of the ankle had been lacerated and the leg considerably contused. In consequence of it she was seven weeks confined to her house and unable to do her ordinary household work. The medical attendant said a sprained joint when badly sprained is more or less injured for life. Her husband was a labourer. And it appeared that, besides doing ordinary household work for herself, she was in the habit of working out for others and earning from four to five dollars a week.

The learned Judge found that there was no evidence that the sidewalk itself irrespective of the snow and ice was out of repair, but that by reason of the snow and ice not having been cleared away for some time before the accident the woman slipped and sustained the injuries complained of; but as the city corporation were not, under the circumstances, in his opinion, liable to be indicted, he thought the action would not lie, and so rendered a verdict for the defendants, but, in the event of the Court being of a contrary opinion, he assessed the damages on the first count at \$60, and on the second count at \$40, certifying, if necessary, for Queen's Bench costs.

During Michaelmas term, November 23, 1877, *W. R. Mulock*, obtained a rule calling on the defendants to shew cause why the verdict should not be set aside and a verdict entered for the plaintiffs on the first count for sixty dollars, and on the second count for forty dollars, pursuant to leave reserved, and on the ground that the defendants were liable to the plaintiffs for damages in respect of the matters sued on herein, and that the learned Judge should have so found and entered a verdict for the plaintiffs.

During this term, February 11, 1878, *McWilliams*, shewed cause. The defendants are not in this Province liable for injury arising from non-removal of snow or ice from the sidewalks: *Ringland v. Corporation of Toronto*, 23 C.P. 93; *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113; *Stanton v. Springfield*, 12 Allen 566. There was also

contributory negligence on the part of the female plaintiff: *Deverill v. Grand Trunk R. W. Co.*, 25 U. C. R. 517; *Cotton v. Wood*, 8 C. B. N. S. 568.

J. K. Kerr, Q. C., contra. *Ringland v. Corporation of Toronto*, 23 C. P. 93, is inapplicable, the law having been since that decision altered by 36 Vic. ch. 48, sec. 384, subsec. 41, and on the authorities defendants are now liable to be sued for such negligence as alleged and proved in this case: *Boyle v. Corporation of Dundas*, 25 C. P. 420, 27 C. P. 129; *Lewis v. City of Toronto*, 39 U. C. R. 343; *Harrison's Municipal Manual*, 3rd ed., 402, 403; *McLaughlin v. City of Corry*, 18 Am. 432.

March 15, 1878. HARRISON, C. J.—The plaintiffs, upon the issue of not guilty to the declaration charging negligence on the part of the defendants, resulting in injuries to the female plaintiff, “without any default on her part,” are bound to prove:—

1. That there was actionable negligence on the part of the defendants.

2. That there was no contributory negligence on the part of the female plaintiff.

Unless both these things be established, it cannot be held that the injuries were caused *solely* by the negligence of the defendants: *Adams v. The Inhabitants of Carlisle*, 21 Pick, 146; *Wilson et ux. v. The City of Charlestown*, 8 Allen 137; *Ryerson v. Abington*, 102 Mass. 526.

The statute which was in force at the time of the happening of the accident, in respect of which this action was brought, was 36 Vic. ch. 48, O.

The 409th section of that Act, (now R. S. O. ch. 174), declared that every public road, street, bridge, and highway should be kept in repair by the corporation, and that on default of the corporation so to keep it in repair, the corporation should, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default.

It was intimated by Mr. Justice Gwynne, in *Ringland v*

Corporation of Toronto, 23 C. P. 93, 99, 100, that such a state of repair as would exempt a city from liability on an indictment for a nuisance, will also exempt them from liability in a civil action; and this appears to have been the opinion of the learned Judge who tried this cause. But as said by Hagarty, C. J. C. P., in *Boyle et ux. v. Corporation of Dundas*, 25 C. P. 420, 424, although this view of the Act has much to recommend it, our Courts have not adopted it as a rule of decision.

It seems to me, looking at the purpose of the section, that to adopt such a rule would be placing too narrow a construction upon the Act.

The corresponding section, 339, of the Municipal Institutions' Act of 1866 was differently expressed, and so expressed as to afford a strong argument for the application of such a rule of decision.

In the absence of language in the late or existing Act providing that there shall be no liability for non-repair except where an indictment would lie, I do not see my way to accept the narrow construction suggested.

The words "the corporation shall, besides being subject to any punishment by law provided, be civilly responsible for all damages," &c., do not, in my opinion, necessarily import the restriction.

Had it not been for this supposed view of the law, I assume from the finding of the learned Judge that his verdict would have been for the plaintiffs in this action.

This presents for consideration the question whether an accumulation of snow and ice upon one of the sidewalks of the city is in any and what case to be deemed a default of the corporation to keep the road in repair, so as to subject the corporation to an action for damages in the event of default.

It must be admitted that the sidewalks of the city are as much a portion of the highway to be kept in repair as the ordinary travelled bed of the road used for carriages and horses : *Hutton v. Corporation of Windsor*, 34 U. C.

R. 487 : *Ray v. Corporation of Petrolia*, 24 C. P. 73 ; *Boyle v. Corporation of Dundas*, 25 C. P. 420, 27 C. P. 129. See further, *Bacon v. City of Boston*, 3 Cush. 174 ; *City of Lowell v. Spaulding*, 4 Cush. 277 ; *Drake v. City of Lowell*, 13 Metc. 292 ; *Hart v. City of Brooklyn*, 36 Barb. 226 ; *Manchester v. City of Hartford*, 30 Conn. 118 ; *Johnston v. Charleston*, 16 Am. 721.

The object of the Act, as pointed out in *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113, 122, is the safety and convenience of the public when lawfully using the highway or any part of it.

If the highway be from any cause, whether of nature or man, in view of the season of the year, situation, and other attendant circumstances, in such a condition that it cannot be pronounced reasonably safe and convenient, it must be said to be out of repair ; and where the corporation has knowledge of its condition, and can at reasonable outlay repair it, and for more than a reasonable time neglects to do so, it must be said that there is a default on the part of the corporation. See *Shea et ux. v. City of Lowell*, 8 Allen 136.

Power was by sub-sec. 41 of sec. 384 of 36 Vic. ch. 48, O., conferred on the council of every city, town, or incorporated village to pass by-laws for the removal of snow, ice, and dirt from sidewalks, streets, and alleys, by persons owning or in occupation of the adjoining premises, and for the removal, if necessary, of snow, ice, and other obstructions from such sidewalks and streets, at the expense of the owners or occupants in case of default.

The same enactment now appears as sub-section 41 of section 466 of the present Municipal Act.

Where a public body is clothed by statute with authority to do an act which concerns the public interest, the execution of the power may be insisted upon as a duty although the statute creating it be only permissive in its terms. See *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113, 121.

It was proved that the defendants long before the grievance, the subject of this action, had availed themselves

of the power, and passed by-laws in accordance therewith.

While I agree with Mr. Justice Gwynne, in *Ringland v. Corporation of Toronto*, 23 C. P. 93, 97, in thinking that the passing of the by-laws by the corporation can neither impose upon the corporation a liability which did not before exist, nor discharge it from liability, if any, which before and independently of the by-law, did exist, I also think that the power to pass such by-laws is a marked indication on the part of the Legislature of what it, the Legislature, considered necessary to be done for the reasonable safety of pedestrians using sidewalks in cities, towns, and villages.

The liability on the part of our municipal corporations to keep highways in repair for the use of persons lawfully using them, whether as pedestrians or equestrians, is imposed in language which is in effect the same as used in the statutes passed in several of the New England States, as fully pointed out in *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113, 123.

It will be found on looking at the decisions of the United States Courts, that the obligation to remove snow and ice from sidewalks is, under certain circumstances, as great as the obligation to remove any other obstruction which unreasonably interferes with the rights of the public.

The leading decision on the point is *City of Providence v. Clapp*, 17 How. U. S. 161. In that case, which was in error from Rhode Island, reference was made to the decisions of the New England States which establish that there is no distinction between obstruction of a highway by falls of snow and any other obstruction, and this was by Supreme Court of the United States accepted as being a correct exposition of the law.

It was held in Massachusetts, *Loker v. Inhabitants of Brookline*, 13 Pick. 343; Vermont, *Green v. Danby*, 12 Verm. 338; Maine, *Tripp v. Lyman*, 37 Maine, 250; *Savage v. Bangor*, 40 Maine, 176; New Hampshire, *Hall v. Manchester*, 40 N. H. 410, that a duty exists to remove snow

and ice like any other impediment to the reasonable use of a sidewalk.

If there be nothing more shewn than the mere slipperiness of the surface of a highway otherwise properly constructed, there can be no recovery: *Stanton v. City of Springfield*, 12 Allen 566; *Johnson et ux. v. City of Lowell*, *Ib.*, 572, note; *Gilbert v. City of Roxburg*, 100 Mass. 185; *Nasson v. City of Boston*, 14 Allen 508; *Cook v. City of Milwaukee*, 24 Wis. 270, 1 Am. 183; *Street et ux. v. Inhabitants of Holyoke*, 105 Mass. 82, 7 Am. 500. But where it is shewn not only that there is slipperiness in the use of the way, but that the snow or ice has been from time to time allowed to accumulate so as to interfere with the proper use of the way, and that it has continued so long that the corporation either had notice or must be presumed to have had notice of it, a recovery may be had whether the sidewalk was properly constructed or not: *Hutchins v. City of Boston*, 12 Allen 571, note, 97 Mass. 272, note; *Luther v. City of Worcester*, 97 Mass. 268; *Stone v. Inhabitants of Hubbardston*, 100 Mass. 49; *Gilbert v. City of Roxbury*, 100 Mass. 185; *Billings v. City of Worcester*, 102 Mass. 329, 3 Am. 460; *Collins v. City of Council Bluffs*, 32 Iowa 324, 7 Am. 200; *Mosey v. The City of Troy*, 61 Barb. 580.

A municipal corporation cannot prevent the general slipperiness of its streets during the winter months, but it can prevent such accumulations of ice and snow as render their passage dangerous: *McLaughlin v. City of Corry*, 77 Penn. St. 109, 18 Am. 432.

When the particular defect cannot be said to be the act of the corporation, there it is clear that there must be established not only the existence of the defect, but its existence for such a time or under such circumstances as to make it reasonable to impute a knowledge of its existence to the corporation and consequent neglect to remove it: *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113, 127, 128.

Where the obstruction is one of such long duration as to be generally observable, the corporation may be charged

with constructive notice of it: *McLaughlin v. City of Corry*, 77 Penn. St. 109, 18 Am. 432.

In the case now before us there was not only evidence of the existence of the defect for a long time, but also evidence that the city commissioner, the proper officer in that behalf, had again and again driven up and down the street without doing anything to the removal of the defect.

The learned Judge, therefore, if the only question were the negligence of the defendants, has, according to the law as laid down in the United States decisions, properly found the defendants guilty of negligence.

Can it be affirmed that the United States decisions are opposed either to the English or Canadian decisions on the point? These are not many, and an examination of them will, I think, dispel any such notion.

In *Sharp v. Powell*, L. R. 7 C. P. 253, the defendant's servant washed a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, but the grating was stopped, and the consequence was that the water flowed over a portion of the causeway, and, owing to the severity of the weather, became frozen. The plaintiff's horse stepped upon the ice and broke his leg. The plaintiff did not recover. Why? Because the real cause of the trouble was the obstruction of the grating, and there was no evidence that the defendant knew the grating was obstructed.

In *Shepherd v. Midland R. W. Co.*, 25 L. T. N. S. 879, some water had been frozen upon a platform of the defendants' line of railway. The cause was unexplained, but from the ice being nearly an inch thick, and extending nearly half way across the platform, it had the appearance of having been frozen for some time. A passenger, who was waiting upon the platform the arrival of a train, and not observing the ice, stepped upon it and fell, sustaining injury. Held, that he was entitled to recover. And why? Because, according to Martin, B.: "The servants of the company ought either to have removed the ice, or have put ashes or something of that nature upon it to have prevented

accidents." And because, according to Piggott, B., at p. 880 :—" If there had only been a very small piece of ice in a place where the railway servants had *no opportunity* of seeing it, there may have been no negligence ; but where we have a layer of ice three-quarters of an inch thick, and extending half across the platform, and that, too, at three o'clock in the afternoon, there was *plenty of opportunity* for them to have seen it, and to have removed it."

Each of these cases is distinguishable from the one before us, but neither of them contains any principle antagonistic to that unfolded by a reading of the United States decisions.

In *Stewart v. The Woodstock and Huron Plank and Gravel Road Co.*, 15 U. C. R. 427, which was an action by the lessee of a road against the company who owned it for not keeping the road in repair by the removal of snow ; the Court held that the lessor did not owe to the lessees any such duty.

But it is said Sir John B. Robinson in delivering judgment remarked, at page 429, " Letting snow lie on a macadamized road does not, in our opinion, come under the notion of suffering the road to go out of repair." These words were not necessary to the decision of the case, and without knowing more of the facts of the case than appears in the report, cannot be well applied.

It is plain, I think, as said by the Court in the subsequent case of *Caswell v. The St. Mary's &c. Road Co.*, 28 U. C. R. 247, 253, that in the former case the Court did not mean to lay down the rule that because a particular part of the road has become specially dangerous by snow, there was no obligation on the person charged with the repair of the road, to remove the same.

Caswell v. The St. Mary's &c. Road Co., 28 U. C. R. 247, was an action brought by one of the public against the owners of the road for neglect to remove snow and ice which had become dangerous to the use of the way, and there was held not only to be the duty, but the right to recover damages for the neglect of it.

The facts were that for a distance of two or three rods.

the snow from a drift was, on 1st March, about two feet in depth, that it had thawed and frozen, and by the action of waggons had been cut into holes and ruts so as to be dangerous, and that it could have been easily remedied as it was remedied after the injury to the plaintiff.

It is true, Mr. Justice Wilson, in delivering the judgment of the Court, said at page 251 : "It is by no means an easy matter to lay down any general rule on the subject, but it is clear the company cannot be required to clear the snow off the ground whenever it falls, or even to remove the ice which may form there. It would frequently be an impossible work to attempt it, and it would be mischievous and a nuisance in some cases to effect it. Snow is looked for in this country, and provided for as forming the best and most suitable means of travelling during the winter, and even when it falls to a great and unusual depth, it is not the duty of any person or body of persons to remove it from the roads. Those who use them at such a time must use them as best they can while this natural and unavoidable impediment lasts." But in a subsequent part of the same judgment he also said, "If a particular part of it, for two or three rods in length, happens to be in a very dangerous condition, exceptionally and particularly dangerous as distinct from the rest of the road, and it can be put in a safe state, and at a reasonable expense, there is no reason why it should not be made safe for travel, although it was caused by rain, snow, or ice, or what may be called natural means."

Other parts of the same judgment are also in perfect accord with the United States decisions. Thus, at page 252, the learned Judge said, "If snow collects at a spot, and by the thawing and freezing the travel upon it become specially dangerous, and if this special difficulty can be conveniently corrected by removing the snow and ice, or by other reasonable means, there must be the duty on the person or body on whom the care of reparation rests to make such place fit and safe for travel. * * * The season of the year can make no difference in cases of this kind, cases of a special and exceptional nature. Natural difficulties and impediments:

must be removed at all seasons of the year if they can be conveniently and reasonably removed, and if their removal is absolutely required for the safety of life and property."

If *Ringland v. Corporation of Toronto*, 23 C. P. 93, so much relied upon by the defendants, contain anything at variance with the law as laid down in *Caswell v. St. Mary's &c. Road Co.*, 28 U. C. R. 247, it would be necessary for me to decide between the two cases, but I do not read it as laying down principles at variance with the decision of our own Court.

I have already said that so far as the Common Pleas case lays down as a rule for the construction of the statute that the act of default must be such as to be the subject of an indictment I respectfully dissent from it. But in that case it appeared that the piece of ice was "about three feet wide," that the weather was "cold and frosty," that "the ice was about an inch thick," and "must have been freezing for at least a day and a night." The learned Judge at the trial nonsuited. The Court of Common Pleas, composed of the same learned Judge and Mr. Justice Gwynne, sustained the nonsuit. I accept the case as deciding that where the ice is no more than "three feet wide" and about "one inch thick," and there was freezing "for at least a day and a night," there must be a nonsuit. The present case is not one of that kind, and so is not governed by it.

All that *Ringland v. Corporation of Toronto*, 23 C. P. 93, as reported, when closely examined, really decides is that the mere existence of a piece of ice on a portion of a sidewalk is no evidence of actionable negligence, and to that extent I concur in it.

I must read the section with a view, if possible, to carry out the design of the Legislature, which was the reasonable protection of persons lawfully using highways vested in municipalities. I have no right to diminish the due effect of the language used by any supposed abuse which may arise under its operation. If the meaning be clear I must give full effect to it, regardless of conse-

quences. If it be found that the meaning attached to the section by a Court is broader than in the interest of the municipalities it should be, the remedy is exclusively with the Legislature.

In this connection I may mention that the Legislature of Rhode Island, in order to weaken the effect of the decision of the Supreme Court of the United States in *City of Providence v. Clapp*, 17 How. U. S. 161, has amended the law of the state by limiting the liability of towns respecting the removal of snow and ice from highways. No city or town in that state is now liable for any "injury to persons or property, caused by snow or ice obstructing any or any part of the highways therein, unless notice of the existence of the particular obstruction shall have been given to the surveyor of highways, in writing, for at least twenty-four hours before the injury was caused; and such town or surveyor shall not thereupon have commenced the removal of such obstruction, or caused any sidewalk which may have been obstructed by ice to be rendered passable by spreading ashes or other like substances thereon": See *Angell on Highways*, 2nd ed., sec. 266, note.

If the sidewalk complained of here were so dangerous and so long dangerous as represented by the plaintiffs and their witnesses, it is incomprehensible that some one did not make it his business expressly to notify the city commissioner about it, in which event, in all probability, all cause of danger would have been immediately removed, and the many residents of the street permitted to make use of the sidewalk without risk of bodily injury.

And this brings me to the point in the case which from the first has most pressed me, and that is the question of contributory negligence. Although touched upon on the argument, it was not raised at the trial either as a ground of nonsuit or as a matter of fact for the decision of the learned Judge who tried the cause without a jury. He informs me that if the point had been raised at the trial, he would most certainly have given effect to it against the plaintiffs.

Our duty is now, after full consideration of the case, to pronounce the verdict which, in our judgment, the learned Judge ought to have pronounced : R. S. O. ch. 50, sec. 287, sub-sec. 2.

It appears that Mrs. Burns knew the place, knew it to be dangerous, knew it to be so dangerous as to be described as "fearful," and unsafe to walk upon it, and yet passed over it once or twice a day for a long time before the day on which she fell as well as during the morning of that day, without apparently, at any time, attempting to avoid it; and instead of doing so on the day in question, was passing over it at four o'clock in the afternoon, when she fell and sustained the injuries for which she and her husband now sue.

If the defect in the highway was such that a person of ordinary care and prudence *having knowledge of the defect* would not, under ordinary circumstances, have attempted to pass over it at her own risk, the female plaintiff had no right to try the experiment otherwise than at her own risk, and certainly not at the risk of the city corporation : *Hubbard v. City of Concord*, 35 N. H. 52 ; *Horton v. Inhabitants of Ipswich*, 12 Cush. 488 ; *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113 ; *Wilson et ux. v. City of Charleston*, 8 Allen 137 ; *Mayor, &c., of Baltimore v. Marriott*, 9 Md. 160.

The previous knowledge of the defect, coupled with the omission to avoid it, is not conclusive evidence : *Reed v. Inhabitants of Northfield*, 13 Pick. 94 ; but it is substantial evidence of negligence against the female plaintiff : *Hutton v. Corporation of Windsor*, 34 U. C. R. 487.

In *Durkin v. City of Troy*, 61 Barb. 437, the plaintiff fell on a patch of ice not extending across the walk, and of inconsiderable extent, and it appearing that he knew of its existence prior to the accident and might have avoided it, a verdict in his favour was set aside.

The difficulty is, that upon the evidence I am unable to decide whether the plaintiff, with the knowledge which she had of the defect, could or could not have avoided it.

For all that appears the snow on the travelled part of the highway may have been so deep that she could not walk through it, and so could not avoid passing over the dangerous place; but she has not shewn this to be the fact, and the learned Judge who tried the cause has a contrary impression from what took place at the trial. It was not dark when she fell. She knew of the danger, and ought therefore, if possible, to have avoided it.

She has not proved that it was impossible to avoid it. The burthen is upon the plaintiffs to establish that the injury of which they complain was caused solely by the negligence of the defendants, and without negligence on the part of the female plaintiff. The affirmative of this issue, under the plea of not guilty, is upon the plaintiffs. Where the evidence offered is as consistent with the injury having arisen from her negligence as from the negligence of the defendants, the case is not, in my opinion, proved. On this ground, and on this ground alone, I feel constrained to discharge the rule *nisi*: *Cotton v. Wood*, 8 C. B. N. S. 568; *Deverill v. The Grand Trunk R. W. Co.*, 25 U. C. R. 517; *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113, 129, 130; *Saunders on Negligence*, 61, *et seq.*

WILSON, J.—I do not think the defendants are shewn to have had notice of the alleged dangerous formation of ice upon the street in question.

The fact that the inspector drove along the street on different occasions is not sufficient.

Nor do I think it is established that the defendants are as liable as if they had received actual notice, by reason of their wilful or culpable ignorance of the condition of the street, because wilful and culpable negligence was not shewn.

The thawing and freezing of the sidewalks it is impossible to prevent in such a place as this locality is said to be, where the adjoining private property is higher than the sidewalk and slopes towards it, so that there is a constant formation of a thin sheet of ice. The ice of the night may be carried

off by the next day's thaw, but only to be renewed by the next night's frost, and it is not possible or reasonable that the city can be required to guard at the peril of an action and damages the daily overflow and freezing of every sidewalk in the city.

Besides, if the place were dangerous, the plaintiff was not obliged to use that particular spot. She did not go upon it by dark, but in broad day. She was not ignorant of the locality, but knew it well, and traversed it frequently, and had passed over it that very day before the accident.

I think in no way has a cause of action been established against the defendants.

ARMOUR, J., concurred rather with WILSON, J., than with the Chief Justice, not being prepared to go the length the Chief Justice has gone on the question of contributory negligence.

Rule discharged.

DENNY V. THE MONTREAL TELEGRAPH COMPANY.

Trap door—Negligence—Contributory negligence—Evidence.

The part of the defendants' office devoted to the public was some 16½ feet long from south to north, the entrance door being at the south, and the width was 5 feet 7 inches. About 4 feet 9 inches from the south, and on the east wall, was a desk or counter for writing messages 7 feet 6 inches long, and 1 foot 7 inches wide. About 5 inches north of the counter, and in the centre of the apartment, there was a trap door leading to the cellar about 2 feet 9 inches square. On the west side of the apartment was a partition about 6 feet high, separating the public office from the operator's apartment, the entrance to which was at the north end of the partition. In this partition there was an opening with a desk in it, where also messages were written and delivered to the operator. D. came in quickly to send a message, spoke to the operator at this opening, and then went beyond the counter as if to go into the operator's room, when, the trap door being open, he fell through into the cellar, and received injuries of which he died. There was evidence given to shew that deceased said it was his own fault, and that he ought not to have been where he was: that the office was a very light one, and that there was no difficulty in seeing the trap, but it also appeared that other persons on other occasions had nearly fallen into it.

The learned Judge, who tried the case without a jury, and viewed the premises, found that the deceased was guilty of contributory negligence, which precluded the plaintiff, his administratrix, from recovering.

Held, that defendants were liable: that the evidence of the open trap door in the part appropriated to the public was negligence for which defendants were chargeable; and that there was no evidence of contributory negligence on the part of the deceased.

ACTION by the widow and executrix of James Denny, for the benefit of herself and the four children of her deceased husband, by reason of the death of the said deceased from the negligence of the defendants.

The declaration charged that the defendants in their telegraph office at Brockville wrongfully and negligently permitted a trap-door in the floor of the office to be and remain open, without being properly guarded, whereby James Denny, who was then in the said office by the invitation of the defendants as a customer of the defendants and otherwise in the business of the defendants, fell through and into the aperture and hole caused by the said trap door being open and not properly guarded, and was thereby injured and killed.

The plea was not guilty, on which issue was joined.

The cause came on for trial before Moss, J., at the last Fall Assizes, at Brockville, without a jury.

The evidence shewed that the part of the defendants' office devoted to the public was a passage $16\frac{1}{2}$ feet long from south to north. The entrance to it was from King street on the south. The full width of the passage was 5 feet 7 inches.

But at the distance of 4 feet 9 inches north of the wall at the entrance door was a desk on the east side 7 feet 6 inches long and 19 inches wide, which reduced the width of the passage for that length to 4 feet.

At 5 inches to the north of that desk was the south side of the trap door. The trap door was nearly in the centre of the passage, and the opening began just at the end of the desk before mentioned, where the passage was restricted to a width of four feet.

The trap was 2 feet 9 inches from east to west, that is across the width of the passage, and nearly the same from south to north, or lengthwise of the passage. The door was hinged upon the east side and the stairs led down from the north side.

There was a partition on the west of the passage about 6 feet high. The upper part of it was of frosted glass, and about midway along that partition there was a recess in it of the depth of $2\frac{1}{2}$ feet, and 3 feet $7\frac{1}{2}$ inches in length from south to north, where there was also a desk for writing messages. At that desk was a window or wicket looking into the operator's room and through which the messages were delivered to the operator. It was about 3 feet 7 inches from the north corner of the recess or desk on the west side of the passage to the south west corner of the trap door. The entrance into the operator's room was on the west side of the passage and just about on a line with the north side of the trap, so that the whole west side of the trap had to be passed to reach the operator's room, and the space between that west partition and the trap which had to be passed to reach the operator's room was $14\frac{3}{4}$ inches in width.

When the deceased entered to write or to deliver his

message there was a Mr. West standing at the desk or wicket in the west partition writing a message. The deceased came to the same desk and stood at the north of West, that is nearer to the trap than West was. The deceased had a suit in the Court then sitting, and he wanted two witnesses sent for. He had written in pencil the names of the witnesses when he went into the office.

Thomas Baker's evidence was as follows: "I was sending some telegrams to Ottawa. My back was turned to the counter. I was standing near the window on Court House Avenue." [The west side of the operator's room, and about ten feet from the wicket where the deceased was.] "I heard some person rap on the counter. I said 'in a minute' without looking off the paper. He rapped a second time; he held up the telegram. I turned; he said 'good day Mr. Baker.' I answered, 'good day.' He turned and walked as if to come round the counter." [That is to continue along the passage to enter the operator's room, in which case, as before mentioned, he would only have 14 $\frac{3}{4}$ inches space of floor to walk upon between the west partition and the west side of the trap.] "I saw his shadow pass in front of the frosted glass. I heard a fall. I dropped the message and ran to the cellar to see. By the time I had got around he had got up (partly). Mr. West and I got him up and sent my nephew for a chair. In the presence of Mr. West he said 'It was my own fault I had no business there.' I recollect speaking to Mrs. Findlay. I met her at the top of the stairs about a week after the accident. She told me that Mr. Denny had told her that it was his own fault; that if he had not been where he ought not to have been he would not have fallen. There could be no mistake as to what she said. I impressed it upon my recollection. I thought it important. When he started to walk around the counter I was looking straight at him. He appeared excited and in a hurry. He seemed impatient to get the message off. He didn't run but he walked quickly. When I said 'good day' he started to come round the counter * * He said it was a very

unfortunate affair, but he had no reflections against me *

* This happened about a quarter past ten in the morning; it was not cloudy. I think this is an unusually light office. I don't think there is as light a telegraph office anywhere in Canada * * I had been subpoenaed to produce some telegrams in Court and I had sent Stewart" (an employee under Mr. Baker the witness) "down to look for them. He had no light and as it was a very bright day I thought he could see from the trap door being open. The boy had only been down for a minute or two. I didn't suppose any one would go near it. In the ordinary run of business only one or two customers come in at a time. The trap door was there when I came" (more than three years ago). "It is the only means of access to the cellar."

In cross-examination he said, "If the man was standing at the middle of the passage between the trap door and the opening of the counter" (on the west side) the trap door would to a certain extent be hidden from Denny * * The trap door when drawn back is not hidden from a person coming in at the front door. I now cannot say whether it is or not. I can't express my opinion upon that."

The learned Judge has noted opposite that passage, "the witness evidently thought the question referred to 'trap' not 'trap door.'"

James West said he noticed the trap door open in front of him when he went into the office. The deceased was probably not more than a minute in the office when he fell. He made some remark to Baker that it was his own fault, and he spoke as if he had no business going around there. "What Denny said I think was, that it was his own fault, that he ought not to have gone around there. I do not think he said that he did not blame any one in particular or any one for it.

Mrs. *Finlay* was called by the defendants, and she said she did not remember telling Mr. Baker that Denny had said the accident was from his own fault, and that if he had not been where he ought not to have been he would not have fallen; but she said if Mr. Baker said she did say so, it must be correct.

There was evidence given that two persons had also nearly met with accidents from the same trap. The counsel for the parties argued the case at the close of the evidence, and the learned Judge, after taking time to consider, expressed his opinion as follows :—

After stating the earlier facts of the case, he said : “The deceased, without any invitation from the operator, started at once” (that is, after he and the operator had bid each other good-day,) “with the object of going around behind the counter. His notion undoubtedly was to get the operator to write the message for him. Standing to the north of James West, he must have been pretty near the trap door, which, unfortunately, was open. The operator had some short time before sent down one of the boys into the cellar, in order to get some old messages which were to be produced in Court, and as the day was bright, the boy had not taken down a lamp into the cellar, but had left the trap door open for the admission of light. The plaintiff attempted to prove that the office was not well lighted, and some evidence was given (although objected to) of other persons having nearly fallen into the cellar on other occasions when the door was left open. At the request of both parties, I visited the office myself, and was confirmed in the view I had formed from hearing the evidence, that the office is very well lit. The day of my visit was dull and gloomy ; still, the trap door was so plain and there was so much light in that part of the room that I can hardly imagine how any one could walk into the hole. It is to be observed that West had noticed it upon his entrance. It was suggested that the deceased may have been partially blinded by the glare of the sun upon the snow ; but even if this were so, I do not perceive that this makes the defendants liable. It was contended that he turned away from the counter with the intention of passing to the desk against the east wall and writing his message there. The evidence of Baker, which I believe, and which is supported by West’s statement, makes this theory quite untenable. He had no business to attempt to go behind

the counter ; he had neither a general nor a special invitation from the agent to do so ; that he felt the accident had happened from this cause, and that it was the consequence of his having endeavoured to go where he had no business to go. It was impossible to get Mrs. Finlay to speak with positiveness, but no one who heard her evidence could doubt that the deceased had furnished ground for such a statement. Baker's evidence upon that point is clear and precise. It is a most unfortunate affair ; but after reflecting over the matter very often, I cannot perceive that the defendants are chargeable. If the deceased had used the most ordinary care the accident could not, in my opinion, have occurred. If it had been a dark part of the room, so that the deceased might have fallen through without any negligence on his part, or if he had been invited by the operator to come behind, the case might have been different. If the Court should think that I am wrong, and that the plaintiff is entitled to succeed, I shall still be willing to assess the damages if the parties wish."

The verdict was therefore entered for the defendants.

In this term, February 7, 1878, *S. Richards*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict should not be set aside and a new trial granted, on the ground that the verdict was against law and evidence in this, that the evidence established the negligence alleged and the injury and death of James Denny thereby and therefrom, that there was no evidence or sufficient evidence of contributory negligence on the part of the deceased, and that on the evidence the plaintiff was entitled to recover ; and on grounds disclosed in affidavits filed. The affidavits referred to stated that one Reid in the summer of 1876, while in the defendants' same office in the ordinary course of business, and while using ordinary care, fell partly into the trap on the floor, which was open ; and that such evidence was discovered first after the plaintiff's case was closed at the trial. In answer to that affidavit, Baker made an affidavit that Reid fell

partly into the trap while he was passing along to enter into the operator's room, where he was going without permission, and that Reid was excitable and impetuous and generally in a hurry, and was not likely to take ordinary and usual care in his movements.

February 21, 1878. *Robinson*, Q. C., shewed cause. The evidence shewed that the deceased was injured while he was attempting to pass from the proper office for the public or customers of the defendants' company into the operator's room, and in doing so he left that part of the office where the customers require to be to write and to deliver their messages, and went to the north part of the office, where he need not have gone and did not require to go, and where he had no business to go or to be for the transaction of his business with the defendants; and on passing along by the trap, which was at that time quite close to the entrance into the operator's room and quite away from the business part of the office, he unfortunately fell into this trap and was injured, from which injury he died. He was guilty of contributory negligence, firstly, by going to that part of the office at all under the circumstances stated; and secondly, by not taking due and ordinary care in going to the operator's room, assuming he had the right to go there. He hurried carelessly past that part of the office where he had no occasion to go at all, and his haste was caused by his impatience to get into the operator's room, where he had no right to be, or to attempt to go. The statements of the deceased shew clearly his own consciousness that he was in fault. The room was well lighted; the trap could be and was easily seen by any one going into the office, and was seen by West, who had gone into the office shortly before the deceased entered. The defendants were, therefore, not answerable for the death of the deceased: *Pickard v. Smith*, 10 C. B. N. S. 470; *Wilkinson v. Fairrie*, 1 H. & C. 633; *Shoebottom v. Egerton*, 18 L. T. N. S. 364; *Axford v. Prior*, 14 W. R. 611; *Hounsell v. Smyth*, 7 C. B. N. S. 731; *Chapman v. Rothwell*, E. B. & E. 168; *Seymour v. Maddox*, 16 Q. B. 326; *Cornman v. The Eastern Counties*

R. W. Co., 4 H. & N. 781, 784; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 585; *Caswell v. St. Mary's, &c., Road Co.*, 28 U. C. R. 247; *Sweeney v. O. C. N. & R. Co.*, 10 Allen 368; *Elliott v. Pray*, 10 Allen 378; *Zoebisich v. Tarbell*, 10 Allen 385; *Indermaur v. Dames*, L. R. 1 C. P. 274, in Ex. Ch., L. R. 2 C. P. 311; *Sullivan v. Waters*, 14 Ir. C. L. 460; *Bridges v. The Directors, &c., of the North London R. W. Co.*, L. R. 7 H. L. 213, 229, 233, 235, 236; *Saund.* on Negligence, 78; *Shearman & Redfield* on Negligence, 3rd ed., sec. 508; *Campbell* on Negligence, 29; *Wharton* on Negligence, sec. 816, and secs. 824 to 833; *R. & J. Dig.*, pp. 2514–2518, and especially the following cases noted there: *Hutton v. The Town of Windsor*, 34 U. C. R. 487; *Anderson v. The Northern R. W. Co.*, 25 C. P. 301; *Boyle v. Town of Dundas*, 25 C. P. 420; *Castor v. Township of Uxbridge*, 39 U. C. R. 113, 130; *Blackmore v. Toronto Street R. W. Co.*, 38 U. C. R. 172. The questions to be decided here were peculiarly for the Judge who tried the cause, sitting as a jury, and saw the witnesses and had a view of the *locus in quo*, and his finding should not be interfered with unless on the plainest grounds of error in law or in his judgment upon the facts, or unless there is some omission or inadvertence which has led to a wrong conclusion: *Smith v. Hamilton*, 29 U. C. R. 394; *Templeman v. Haydon*, 12 C. B. 507; *Scott v. Dent*, 38 U. C. R. 30; *Stratton v. Staples*, 59 Maine 94, 100; *Murray v. McLean*, 57 Illinois 378, 385; *Trumpour v. Saylor*, 1 App. 100; Rev. Stat. O. ch. 38, sec. 18, sub-sec. 3. And he has very distinctly found that the deceased was guilty of contributory negligence, because, he said, “I can hardly imagine how any one could walk into the hole * * If the deceased had used most ordinary care the accident would not, in my opinion, have occurred;” and that finding was after a personal inspection of the room, and upon seeing the manner in which the whole office was lighted.

The argument on the affidavits filed for a new trial is not stated, as the Court did not consider they could in this case interfere on that ground.

S. Richards, Q. C., and Fraser, contra. Prima facie having an open trap in the floor of the defendants' public office where the customers of the defendants are invited to go is wrongful and careless conduct on the part of the company, and *prima facie*, damage happening to any of such customers by falling into the open trap while in the office in the due course of business renders the company responsible for such accident. Such a place, if opened at all when customers were attending the office, should have been guarded so that no misfortune, such as occurred here, should happen: *Indermaur v. Dames*, L. R. 1 C. P. 274, in Ex. Ch. L. R. 2 C. P. 311; *John v. Bacon*, L. R. 5 C. P. 437. If the door had opened towards the south persons entering the office could have seen it, or would have been protected by it from falling into the trap at the north side where such accidents would be the most likely to happen. But in this case the door opened towards the east, and it rested against the east wall, and the counter on that side, which runs close up to the trap, prevented it being seen, so that on entering the office door a person could not see or could not well see whether the trap was open or not. He would not notice it or would not be likely to notice it. There was no contributory negligence. It is said that the deceased had no business to be in that part of the office where the trap was. But why not? The public were invited to use the whole of the office, and where the trap was, was a part of it. When the deceased was at the west counter or wicket he was within $3\frac{1}{2}$ feet of the trap and a step or two in that direction would take him into it. That is certainly too near to the wicket where all customers must go. Then again if the deceased was at the north end of the east counter he would be within five inches of the trap. If the deceased were passing from the west to the east counter to write his message because the west counter was then occupied by Mr. West, and the deceased was in a hurry, as it is said he was, he might without the least neglect on his part have stepped the $3\frac{1}{2}$ feet to the north and so have fallen into the trap. A per-

son is not bound to be on the look out in a place of that kind for all kinds of dangerous instruments and pitfalls, he is invited to go as to a place of safety and he is right in relying upon the faith of its being such a place as it is represented or held out to be, and his life is not to be taken because he has stepped a few inches more or less out of the direct course. The learned Judge found that the deceased was not going to the east from the west counter when the accident happened, but that he was on his way to enter the operator's room on the west. That, however, is mere conjecture. But, even if he were, he was still entitled to be protected against such a trap. He was not wrong in going there, although perhaps he should not have gone there. People frequently went there without being invited to do so. There was no notice forbidding any one from going there. The deceased, even if he had seen the trap, would still be entitled to be protected from injury, because he might have forgotten that it was open and dangerous. The defendants were guilty of such gross negligence that they must be liable unless they prove a case of very gross negligence on the part of the deceased, and that they have not done. The expressions attributed to the deceased by Mr. Baker and Mr. West, that he was injured by his own fault and that he had no business to go there, and that it would not have happened if he had not tried to go round there, that is, as the defendants say, round by the side of the trap towards the operator's room, have had more stress laid upon them than they deserved by the learned Judge.

March 15, 1878. WILSON, J.—This is one of a class of cases which it is not very easy satisfactorily to deal with. It is certain the defendants were guilty of serious negligence by having an open unguarded trap in the floor of their public office to which customers were invited, and in the situation in which it was, about four feet from the west counter or wicket to which all persons doing business there must go, and so very close to the north end of the east counter. That the trap was a dangerous one cannot

be doubted; accidents had upon two or three occasions nearly happened there before, and on this occasion Denny lost his life by falling into it.

It is very clear that those who entered the office did did not go there with any notice or expectation of anything dangerous to life being there. On the contrary, they went there in the belief that everything was safe for them, and more than that, the defendants invited them there expressly upon the faith and understanding of everything there being safe for them.

Those who went to the office on business did not therefore go there to look out for or to guard against danger. Why should they?

If they had been visiting a building in the course of erection, or of repair, they would require to have used great caution, because the condition of the place would have given them warning to look out for accidents, even if they were invited by the owner to make such visit. Or if they were visiting a factory on invitation, where there were wheels and shafts and gearing in motion in all directions, they would be obliged to use caution commensurate to the danger to be guarded against. Or if they were inspecting grounds which they were warned were protected by traps or guns, they would necessarily understand they must use much more care than if they were walking upon the travelled highway or other safe place.

But why was Denny to look out for an open trap door when he entered the office? He was not bound to look for it. He had no cause to look for it. He believed, and he was invited to believe, there was no such trap, and that he need not look for one. That he did not look for one and did not see it is not at all wonderful, and it was no evidence of negligence on his part that he neither looked for nor saw it.

It is true West says he saw it when he entered. The answer to that is, that it is fortunate for him he did see it. It was indeed very lucky he did, for he did not, I venture to say, expect to find such a thing at such a time and in such a place.

It is not, therefore, the least evidence of negligence against Denny that he did not happen to see it too. It was undoubtedly his misfortune, but I cannot say it was his fault. He had no more reason to look for a hole in the floor than to look for a load of bricks over his head.

In such a case I should require strong evidence to relieve the defendants from their very great neglect, and to cast the whole of the blame upon the deceased, or so much of it as would make him contributory to his own death.

That the learned Judge "could hardly conceive how any one could walk into the hole" while there was so much light in the office at the time of the accident, and when the trap was so plainly seen when the office was entered, does not convince me that the deceased was guilty of contributory negligence because he did not see the trap. The answer is, this man did walk into the hole, and he did not mean to do it, and he did not know he was doing it, and he did not see it; and why? Because he believed, and he was led to believe by the defendants, he was in a place of security, and that he need not look out for traps or anything dangerous to life; and he therefore did not look for them, and was not obliged to do it.

Seymour v. Maddox, 16 Q. B. 326, does not apply, because there the relation of master and servant existed.

Southcote v. Stanley, 1 H. & N. 247, was the case of a visitor, and does not apply. The declaration did not contain the proper allegations for such a case. But even in that case, Bramwell, B., said, p. 250: "Where a person is in the house of another, either on business or for any other purpose, he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance, that he will not allow a trap door to be open, through which the visitor may fall."

In *Toomey v. London, Brighton and South Coast R. W. Co.*, C. B. N. S. 146, the plaintiff having occasion to go to the urinal enquired of a stranger where he should find it, and having received a direction by mistake opened the door of the lamp room and fell down some steps and was injured.

and it was held no action would lie. It was a stranger who directed the plaintiff to the wrong place. The plaintiff himself opened the door, and as the steps there were not dangerous, and the place was proper enough for the purpose, there was no fault on the part of the defendants.

In *Cornman v. The Eastern Counties R. W. Co.*, 4 H. & N. 781, the foot of the weighing machine, which stood about six inches above the platform, was held not to be an obstruction which made the company liable for the plaintiff being forced against it by a crowd, and injured by the fall. It was in a proper place and was necessary. It had stood there about five years without an accident happening. It was a large machine which any one could see. There was no evidence that there was any likelihood of danger from the machine where it stood, and the accident was caused by the pressure of the crowd.

At p. 785 Bramwell, B., said, "In a case in which I was counsel, the plaintiff came to a shop to measure a picture for a frame, and followed the defendant over a counter. He dropped through a skylight. There was a verdict for the plaintiff, and a rule to enter a nonsuit was refused."

It is clear that an owner of land is under no legal obligation to fence an excavation on it unless it is near to the public highway as to constitute a nuisance: *Hounsell v. Smyth*, 7 C. B. N. S. 731.

In *Wilkinson v. Fairrie*, 1 H. & C. 633, the plaintiff was sent by his employer to the defendants for some goods. He was directed by the defendants' servant to go along a passage to a counting-house where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase and was injured. Held the defendant was not liable, as he was not bound to light the passage or fence the staircase. The chief Baron said the nonsuit was directed on this alternative "if it was so dark that the plaintiff could not see, he ought not to have proceeded without a light; if it was sufficiently light for him to see, he might have avoided the staircase;" and the chief Baron

added, "which is a very different thing from a hole or a trap door, through which a person may fall:" p. 635.

In *Hardcastle v. South Yorkshire R. W. and R. D. Co.*, 4 H. & N. 67, the chief Baron said, at p. 74: "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, * * be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences."

In all cases where persons step off the highway on private property adjoining it I presume they are strictly speaking trespassers. Yet an excavation or unprotected area and the like adjoining the highway is held to make the highway dangerous, because persons cannot and are not required to keep to the exact limit of the roadway, they may without blame or neglect take a "false step," and it is to guard against such false step and the like that the owner of ground adjoining or near to the highway which makes the highway dangerous, in case of such accident is responsible to the person who is injured. A trespasser on ground may have a remedy if dangerous instruments are put there without notice to him: *Bird v. Holbrook*, 4 Bing. 628; *Barnes v. Ward*, 9 C. B. 392, 420.

In *Martin v. Great Northern R. W. Co.*, 16 C. B. 179, the plaintiff was running along the line where he had no right to be, to overtake a train, and ran against a switch-handle, which was not protected or lighted, and it was held he was entitled to recover.

In *Axford v. Prior*, 14 W. R. 611, the plaintiff went to a public house to meet a friend, and while waiting he walked from the room where he was into a parlour, and then fell through a hole in the floor—the floor then undergoing repair. The declaration stated he was in the house as a guest, and the jury found for him. He had no other business there than to wait for his friend. He went without any necessity to the room where he was injured. The Court refused to interfere with the verdict.

In *Chapman v. Rothwell*, E. B. & E. 168, Erle, J., at p.

170, said: "If you invite a customer to come to your shop and leave a pit-fall open, or a large iron peg in the part of the floor over which the customer is likely to tread or sit, is not that a duty and a breach, if an accident ensues?" There the trap-door was in the passage leading from the street to the defendants' office, and in that case differs from the case in hand.

In *Corby v. Hill*, 4 C. B. N. S. 556, 567, per Willes, J.: "One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury."

Pickard v. Smith, 10 C. B. N. S. 470, was the case of a trap-door on a railway station opened to put in coal. *Whiteley v. Pepper*, L. R. 2 Q. B. D. 276, was a case of a coal grating on the highway being opened. In each case the plaintiff who was injured recovered.

The chances were greater in these cases, or quite as great, of the trap being observed as it was in this case.

In *Indermaur v. Dames*, L. R. 1 C. P. 274, the plaintiff, a gas-fitter, was upon the defendant's premises to test the new gas apparatus. There was a hole or shoot in the floor of the defendant's sugar-refinery not fenced. Before going there the agent of the master-workman cautioned the plaintiff that "sugar-houses are very peculiar places; they neither allow candles nor lucifers. We must keep our eyes open. There is a man to go with us with a light. I shall follow the man; and you keep close to me." After inspecting the gas at one place, they proceeded to another part of the floor to inspect the gas there. The plaintiff who had left a pair of plyers at the spot they first went to turned back to fetch them, but instead of going around the way the manager and the other man had gone he walked straight across, not perceiving an intervening hole in the floor, and he fell through it and fractured his spine. Willes, J., at p. 278, said: "The proposition is, that this was a danger which was known to the defendant, but of which

the plaintiff, to the knowledge of the defendant, was ignorant." See also p. 289.

At p. 287 he said : A customer resorting to a shop on business "is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted."

The evidence in that case was very conflicting as to the light; the plaintiffs' witnesses said there were only two lights on the floor, the defendant's that there were five, and that the light was ample.

From that case it is very plain that the plaintiff knew he was in and that he was moving about in a dangerous place, and that much more caution was required of him than if he were in a place where no such danger existed. He had also been cautioned; and although the Court had doubt upon the case they would not interfere with the finding in the plaintiff's favour.

In *Murray v. McLean*, 57 Illinois 378, the deceased supplied the defendant with kegs for their tobacco manufactory. There were holes cut in the floors of the factory for moving up and down loads by an elevator. The openings were fenced when the elevator was not in use. When it was in use a bar across one side of the guard was removed. The deceased came into the factory and fell through the trap-door from the first floor to the cellar; the first that was known of him being on the premises was by his cries in the cellar. When he was lifted out of it he was asked how he happened to be there; he said "he did not know what took him there; that he had no business there at all;" and he said, "I knew where the hatchway was just as well as you gentlemen do." He several times repeated that.

The hatchway was sixty-five or seventy feet back from the front of the building where were situated the office and room in which the business of those coming to the factory was transacted, and it was a place where no one except the

employees of the house had any business, and could not reasonably have been expected to be exposed to danger.

Had the hatchway been at a place where persons were accustomed to pass and re-pass, or to be about, and their presence there ought to have been reasonably anticipated, a higher degree of care might have been expected of the appellants.

The building had good light, and a gas-light was kept constantly in the basement underneath the hatchway and near to it, the flame of which was visible on approaching the hatchway from the front of the buildings. The Court, therefore, reversed the judgment given on a verdict for the administratrix of the deceased.

In that case the deceased not only went into a dangerous place, but he knew the place of danger as well as those employed in the factory, and he was plainly in a part of the building where he had no pretence for being, and the dangerous hatchway was a considerable distance from the part of the building where he should have been.

In *Boyle v. Corporation of Dundas*, 25 C. P. 420, it was held that the female plaintiff was not entitled to recover for injury sustained by stepping into a hole in the plank sidewalk, about sixteen inches long and about six inches wide. She slipped into it in broad daylight; it was said to be easily visible; it was near to her own house, and she was well aware of it; but it was said there was a little snow over it which made it more difficult to see. The Court granted a new trial.

In *Greenland v. Chaplin*, 5 Ex. 243, the plaintiff was held entitled to recover against the defendant, for running against a steamboat on which the plaintiff was a passenger and injuring him, although he was in a part of the vessel where he ought not to have been. It will be observed that the action was against the owner of another boat, who could not raise the right of the plaintiff to be where he was.

In *Watson v. Northern R. W. Co.*, 24 U. C. R. 98, the plaintiff, a passenger on the defendants' train, went into the express company's compartment, where he had

no right to be. The conductor saw him there, and did not order him to leave—but passengers frequently went in there to smoke. While there the defendants' train was, by their negligence, run into by another train, and the plaintiff was injured. It was held he was nevertheless entitled to recover.

The case of *John v. Bacon*, L. R. 5 C. P. 437, is also very applicable. There the defendant made use of a hulk from which the passengers by his boat boarded it; the passengers descended from the upper deck of the hulk by a ladder to the lower deck, to go on board the boat; near the foot of the ladder was a hatchway, into which the plaintiff fell, without negligence on his part, and was injured, and he recovered against the defendant for the neglect in not guarding the hatchway,

I have examined all the cases cited, and some others which were not mentioned, and I think there is nothing in any of them which leads me to concur in the conclusion which the learned Judge came to.

The deceased had no reason to look for a trap-door in the public telegraph office, where he was as a customer of the defendants.

The office was at that part of it just four feet wide, and the opening of the trap extension about thirty-three inches across the floor. That the deceased did not see it is not surprising when he had no cause to look for it, or to apprehend any kind of danger in the office.

It is certain he did not know of it, and the defendants did know of it, and they did nothing to caution the deceased or to notify him of it; and, as against those who are wrong-doers, it may be presumed until the contrary be shewn they were aware the deceased did not know of the trap being there.

If the trap-door had been down in its proper place the deceased had the right to be upon the very spot where the door was, and if being there from the rottenness of the door he had broken through into the cellar and been injured, he would have been entitled to damages.

It was in and upon that very spot, where he was and had the right to be, where he was injured ; and as the floor was not there for him to step upon as it should have been, the defendants are to blame.

But if he had not the strict right to be upon that very spot—though why such an assumption should be made I cannot tell—I still think the plaintiff is entitled to recover, upon the principle that the proprietor of adjoining land to a highway, who has a dangerous unprotected excavation close to the roadway is answerable for damages to those who inadvertently, or by a false step, fall from the highway into the excavation. If this trap, three and a-half feet from the wicket, had been that distance from a highway, the owner of the trap would be answerable to a traveller on the highway falling into it, unless he could excuse himself by shewing contributory negligence. How much more strictly should this rule be made against the defendants in this case, for the deceased was not off the ground on which he had the right to be, although he was much nearer the trap than three feet and a-half. He was, the defendants themselves must admit, still standing rightfully upon the ground if he were but one inch from the trap.

Can it then be possible that no one can recover for damages if injured in such a case when he inadvertently takes a false step in an office of this kind one inch off the exact limit ?

I hold the defendants, then, to be liable, upon the ground that they had a dangerous trap too near to that part of the floor to which they say the deceased should have confined himself ; and as I may say figuratively, to adapt it to the analogous case before mentioned, too near to the highway.

But it is said, admitting he had the right to be upon the very spot covered by the door of the trap, he was there for the purpose of going into the operator's room where he had no right to be.

Whether he had that right or not he never got there ; and it is not quite certain he meant to go there. But is it

of any consequence where he was going to if he had the unquestioned right to be just where he was when he was injured? I think it is not. Is it certain he would have been a wrong-doer if he had gone there?

It was shewn persons were in the habit of going there; and were not forbidden, and there was no notice up against it; and some of the cases already mentioned shew that if the deceased had been there where he should not strictly have been, and had been injured by a trap, the defendants would still have been liable.

It is said the deceased admitted it was "all his own fault in going around there"—that is, as the defendants understand it, in going around to, or rather towards the operator's room—and that the plaintiff cannot therefore recover.

As I have said, he had plainly the right to be just where he was when he fell into the trap; he had not reached the operator's room, if he was attempting to go to it, and I cannot conceive how his unfulfilled intention can make the least difference in the defendant's position.

A person may be on the highway passing along, with the intention of committing a highway robbery a little way off; but if he fell into an excavation which some person or body was liable for leaving in that state, and was injured before he committed the robbery, I imagine there is no doubt he would be entitled to recover damages for the injury he had sustained, although he contemplated committing a felony.

In every view of the case I think the rule should be absolute for a new trial. I think, with all respect for the learned Judge, and for the great attention he has given to it, that the cause has not been fully, and if I may say so, properly tried.

I feel the delicacy that is natural in setting up my own judgment against the considered opinion of another Judge, who is at least as competent and may be far more competent than myself to dispose properly of the case; and I should in such a case be disposed to adopt his finding, even if I were not quite satisfied with it, rather than set up my judgment adversely to his.

In this case, however, I form an entirely opposite opinion both upon the law and on the facts of the case, and I can do no otherwise than fairly to state it.

If the damages had been assessed I should have felt bound to enter the verdict for the plaintiff at once, but as the damages have not been assessed there should, in my opinion, be a rule absolute for a new trial, without costs.

HARRISON, C. J., and ARMOUR, J., concurred.

Rule absolute.

DRIFFILL V. MCFALL.

Certificate for costs—Power of Court to grant—R. S. O. ch. 50, secs. 345-8.

Where a verdict for substantial damages is subsequently reduced by the Court to a nominal sum, the Court has power under secs. 345-8, of R. S. O. ch. 30, to grant a certificate for costs; but the motion must be made when the judgment reducing the verdict is delivered, or before the rule absolute is issued, unless the matter is postponed to a future day.

In this case the judgment reducing a verdict for \$1,000 to nominal damages, was delivered on the judgment day after Easter term, but no certificate was then moved, and the rule absolute issued without one. The Court, notwithstanding the delay, as the practice was new, granted the certificate on a motion made in the following term, and directed the rule absolute to be re-issued with a certificate embodied therein.

DECLARATION in trover, and upon the common money counts.

The case was before the Court in 41 U. C. R. 313. The plaintiff obtained a verdict at the trial, and \$1,000 damages, which the Court afterwards reduced to a nominal sum.

The judgment reducing the verdict was delivered on the judgment day after Easter term, but no certificate was then moved for; and the rule absolute issued without one.

In Michaelmas term, November 28, 1877, *McCarthy*, Q. C., obtained a rule calling upon the defendant to shew cause why a rule, order, or certificate entitling the plaintiff to tax full costs, or for such other order as to the Court might seem meet, should not be granted to the plaintiff.

In Hilary term, February 14, 1878, *Osler* shewed cause. As no certificate was moved for at the trial, it cannot be granted now. If the verdict is to be considered as having been given by the Court, as the cause was tried without a jury, then the plaintiff should have moved for a certificate for costs when their verdict was given. But as the term has gone by, it is now too late to make this motion: *Flower v. Lloyd*, L. R. 6 Ch. D. 297.

Creelman, supported the rule: R. S. O. ch. 50, sec. 347.

March 15, 1878. WILSON, J.—By the common law there were no costs taxed to either party. But when damages were recoverable the plaintiff, if he had a verdict, was in effect allowed his costs, for the jury always computed them in assessing the damages: *Gilb. Hist. of C. B.* 214, 215, 216.

After the statute of Gloucester the Courts made it a rule that the jury should tax the damages apart and the costs apart, so that it might appear to the Court that the costs were not considered in the damages: *Ibid.*; *Reeve's Engl. Law*, 3rd ed., vol. iii., 400.

The rule after the statute was, that the plaintiff in all actions in which he recovers damages shall also recover his costs of suit.

In England the practice is yet for the jury, on finding for the plaintiff, to assess a certain sum for costs besides the damages assessed; and the Court afterwards awards the proper measure of costs to the plaintiff *of increase*.

The word damages includes costs: *Phillips v. Bacon*, 9 East 298.

In effect, however, the jury have nothing whatever now to do with costs.

In *Poole v. Whitcomb*, 12 C. B. N. S. 770, 771, the counsel for the plaintiff said: "Juries have a right to consider

them (costs) as well as damages; and it is only by usurpation of the Courts that they have become severed."

Willes, J., in giving judgment, said, at p. 774: "It is idle to say that to take the consideration of the costs from the jury is an usurpation on the part of the Court, because the very last statutory provision upon the subject;—the 34th section of the Common Law Procedure Act, * * expressly enacts that when, &c. * * The Legislature there in express terms says that it is the Judge and not the jury who shall have the power of deciding whether or not the plaintiff shall have costs."

I refer to that case merely to shew that the question of costs, as we all know, has long been held to be expressly regulated by statute.

The plaintiff will recover them since the statute of Gloucester, unless he is disabled by some statute from taxing them.

If the damages had been assessed at twenty cents by the Judge at the trial, the plaintiff could not have recovered his costs of suit without a certificate granting them to him.

The provisions now regulating costs in such cases are contained in what are now the R. S. O. ch. 50, secs. 345–348, both inclusive.

Section 345 enacts, that "If the plaintiff in any action of trespass, or trespass on the case, recovers by the verdict of a jury less than eight dollars, such plaintiff shall not be entitled to recover, in respect of such verdict, any costs whatever, whether the verdict has been given on an issue tried, or judgment has passed by default, unless the Judge or presiding officer before whom such verdict is obtained, immediately afterwards, or at any future time to which he may postpone the consideration of the matter, certifies on the back of the record in the form hereinafter prescribed, to entitle the plaintiff to full costs; and in case such certificate is not granted, then the defendant in such action shall be entitled to set off his costs," &c.

If the *Court* comes within the terms of this statute it may direct how the costs shall be taxed. If it do not come within the terms of the enactment, then the plaintiff "is

not to recover any costs whatever" without a certificate, simply because there is no proper person within the terms of the section competent or authorized to give it.

I am inclined to think that the Court may deal with the costs in like manner as the Judge or presiding officer may under that enactment.

Under section 347 the enactment is not in the like negative form. It is "In case a suit of the proper competence of a County Court is brought in either of the Superior Courts of common law, or in case a suit of the proper competence of a Division Court is brought in either of such Superior Courts, or in a County Court, the costs shall be taxed in the manner hereinafter mentioned :—

1. In case the Judge who presides at the trial of the cause, certifies in open Court, immediately after the verdict has been rendered," &c.

2. Is worded in like manner.

If the Court is within this section, it may deal with the costs as the Judge might.

If the *Court* is not within the terms of the enactment, there are no negative words to restrain the plaintiff from recovering his costs of suit according to the general rule and tariff of the Court in which the suit is brought.

It is more consistent with our opinion of the proper meaning and effect of the previous section to hold that the Court may deal with the costs under this section as well, when it gives the verdict.

I think, however, the motion for costs should be made when the verdict is ordered to be entered by the Court, or before the rule for that purpose is issued, unless the consideration of the matter has been postponed till a later time.

In this case there was no motion made when the verdict was ordered to be reduced by the Court, nor before the rule was issued for that purpose ; but as there has been no rule, practice, or decision upon this point up to this time, we think the plaintiff should be allowed to re-issue his rule, and embody in it that he be allowed to tax his full

costs of suit, as we are of opinion he is entitled to them, and would certainly have got a certificate to that effect if he had applied for it at the trial.

I may say the Court of Common Pleas has in several cases dealt with the costs in this manner when giving the verdict.

I may also say that it appears to me when the Court gives the verdict that the whole proceedings should be entered of record, the verdict given at the trial, the motion to the Court, and the verdict given by the Court, just as the whole proceedings are entered on the roll under the Consol. Stat. U. C. ch. 112, when a case is reserved for the opinion of the Court in criminal cases.

Rule absolute without costs.

CURRIE V. HODGINS AND BRADFORD.

Promissory note—Subsequent acceptance of mortgage—Merger—Discharge of surety—Reservation of remedy—Parol evidence.

B., to the plaintiff's knowledge when he became the holder thereof, endorsed a promissory note for \$1,400, dated 7th November, 1876, payable four months after date as surety for H., the maker. On 3rd February, 1877, before the maturity of the note, the plaintiff, without B.'s knowledge, accepted a chattel mortgage for the amount secured by the note as for some additional items, with a proviso for redemption on 3rd February, 1878, with interest at ten per cent, and with the usual covenants for payment. The mortgage did not on its face refer to the note, but it was proved that it was the understanding between the plaintiff and H. that it was to be received as collateral security only, and not to affect the plaintiff's remedy on the note.

Held, that B., the surety, was not discharged: that the mortgage did not operate as a merger of the note, not being by the same parties and for the same debt as the note; and that the reservation of the remedy on the note, notwithstanding the giving of time by the mortgage, might be shewn by parol evidence, without appearing on the face of the mortgage.

Quære, whether the taking of a specialty security from one of two joint debtors on a simple contract will operate as a merger; and whether *Loomis et al. v. Ballard et al.*, 7 U. C. R. 366, can be followed since *Sharpe v. Gibbs*, 16 C. B. N. S. 527, and *Boaler v. Mayor*, 19 C. B. N. S. 76.

This was action brought by the plaintiff, the holder of a promissory note for \$1,400, dated 7th November, 1876,

payable four months after date, made by the defendant Hodgins, and endorsed by the defendant Bradford.

The defendant Hodgins allowed judgment to go by default.

The defendant Bradford pleaded, among other pleas, a plea on equitable grounds, to the effect that he endorsed the promissory note for the accommodation of Hodgins, and as his surety only, to secure a debt due to the plaintiff from Hodgins, of which the plaintiff at the time of the endorsing of the note had notice, and after it became due the plaintiff, while he was holder of the note, did, without the consent of the defendant, and for a good and sufficient consideration in that behalf, agree with Hodgins to give time and then accordingly gave time for the payment of the said note beyond the time when the same was due and payable.

Issue :

The cause was tried at the last fall assizes for the city of Toronto, before Hagarty, C. J. C. P., without a jury.

It was proved that defendant Bradford endorsed the note as a surety only for the defendant Hodgins, as the plaintiff at the time he became the holder of the note well knew: that on the 3rd of February, 1877, before the maturity of the note, the plaintiff, without the knowledge of the defendant Bradford, accepted from the defendant Hodgins a chattel mortgage for the sum of \$1,390, being for the amount of the debt secured by the note, and some additional items, with a proviso for redemption on payment of \$1,390, with interest at the rate of ten per cent. per annum, on the third February, 1878, and the usual covenant under seal for the payment of the money.

The mortgage did not, on its face, make any reference to the note.

Hodgins swore that at the time of the making of the mortgage there was nothing said about the note, but his understanding of the transaction was, that the mortgage was only collateral, and the plaintiff's remedy on the note was not to be thereby affected.

The plaintiff also swore that when he accepted the mortgage there was nothing said about the note, but his understanding of the transaction was in effect the same as that of Hodgins.

Counsel for the defendant submitted that the defendant was entitled to a verdict on the ground that the note made on 7th November, 1876, and the mortgage subsequently given, being for the same money, and being for a year on the face of it, proved the defence.

The learned Chief Justice found that the mortgage of February was taken without Bradford's actual knowledge or assent, but that the true version of the facts was that as between Hodgins and the plaintiff, the latter's hands were not tied, and that both parties understood the plaintiff could have proceeded to enforce the ordinary paper *non obstante* the time given in the mortgage. He therefore rendered a verdict for the plaintiff for \$1,348.78, being the amount of the note and interest.

During Michaelmas term, November 27, 1877, *Beaty* Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant Bradford, pursuant to the Law Reform Act, or a new trial had between the parties on the following, among other grounds:

1. That the said verdict is contrary to law and evidence.
2. And on the ground that the plea of the defendant Bradford that he was an endorser and only a surety, and that the plaintiff had given time without his knowledge or consent to the principal, the other defendant and maker of the note, was proved.
3. That the note was merged in the chattel mortgage from Hodgins to plaintiff of 3rd February, 1877, the note having been made on 7th November, 1876, and not due until 10th November, 1877, and at the time of the said transaction in plaintiff's hands, and that one year for payment of the debt in the mortgage, being the same as the promissory note, being given, the plaintiff's hands were tied, he

having sworn to and registered said mortgage, and accepted the same.

4. That at the time of the taking of the said mortgage or contemporaneous therewith, no reservation was made in writing, or otherwise, of the rights of the plaintiff against the defendant, such agreement was not in fact come to by the plaintiff and defendant Hodgins at any time.

During this term, February 5, 1878, *Kerr*, Q. C., shewed cause, and contended that notwithstanding the acceptance of the mortgage there was no giving of time on the note, and that the mortgage was collateral to the note. He cited *Molson's Bank v. McDonald*, 40 U. C. R. 529, 538, 539.

Beaty, Q. C., contra. The effect of the transaction was the giving of time for the payment of the debt for which the note was only a security, and there being no reservation of the remedy by the deed against sureties, and no assent of the surety, the latter is discharged: *Pooley v. Haradine*, 7 E. & B. 431; *Taylor v. Burgess*, 5 H. & N. 1; *Greenough v. McClelland*, 2 E. & E. 424; *Bailey v. Edwards*, 4 B. & S. 761; *Ewin v. Lancaster*, 6 B. & S. 571; *Oriental Financial Corporation v. Overend, Gurney & Co.*, L. R. 7 Ch. 142.

March 15, 1878. HARRISON, C. J.—The defendant is a surety, and insists that he is discharged from his contract by reason of dealings between the creditor and the principal debtor inconsistent with his rights as a surety.

It was decided as long since as 1795, by Lord Loughborough, in *Rees v. Berrington*, 2 W. & T. L. C., 5th ed., 992, and has been since repeatedly affirmed, that where time is given by a creditor to a principal debtor without the assent of the surety, the surety is discharged, on the ground that the surety is thereby deprived of his right on paying off the creditor at once to sue the principal debtor.

This is now the well understood rule, adopted alike in Courts of Law and Equity: *Bailey v. Griffith*, 40 U. C. R. 418.

It is, in the eye of the Court, a fraud in a creditor to

proceed at law against a surety after he has agreed with the principal debtor to enlarge the time for payment of the debt: *Davies v. Stainbank*, 6 DeG. McN. & G. 679, 696.

If the creditor has, by any means, voluntarily placed himself in such a position as to be compelled to admit when requested by the surety to sue the principal debtor, that he is unable to do so, the surety is discharged: *Strong v. Foster*, 17 C. B. 201, 219.

The defence either at law or in equity does not arise by reason of any alteration of the original contract, which indeed it assumes, and relies on its original terms, but that the creditor cannot equitably sue the surety where knowing of the existence of the relationship of suretyship he has voluntarily tied up his hands from proceeding against the principal: *Pooley v. Harradine*, 7 E. & B. 431, 442.

It is not necessary to the operation of the rule that it should be shewn that the creditor, when he accepted the contract, agreed to treat the surety only as a surety, for the right of the surety arises simply from a knowledge on the part of the creditor of the relation of suretyship, and the obligation thence arising on the part of the creditor to do no act unless with the assent of the surety affecting the contract of suretyship: *Greenough v. McClelland*, 2 E. & E. 424; *Taylor v. Burgess*, 5 H. & N. 1; *Ewin v. Lancaster*, 6 B. & S. 571.

It would appear that this obligation arises even where the knowledge is acquired after the creditor accepts the instrument of suretyship: *Bailey et al. v. Griffith*, 40 U. C. R. 418.

The act of the creditor which has the effect of discharging the surety, must be not only an act binding on the creditor in the nature of a contract: *Collins v. Owen*, 15 L. T. N. S. 327; but be something which can be fairly said to be against the faith of the contract of suretyship: *Petty v. Cooke*, L. R. 6 Q. B. 790; and this, irrespective of the consideration whether it is for the benefit or to the prejudice of the surety: *Titus v. Durkee*, 12 C. P. 367.

The argument on behalf of the defence is, that the plaintiff by accepting the mortgage under seal from the principal

debtor containing a covenant for the payment by the debtor of the same debt as secured by the note, but postponing the time for payment, and at an increased rate of interest, either operated as a merger of the liability of the principal debtor on the simple contract debt, or, as there was no reservation of remedy against the surety in the deed, had the effect of giving time for the payment of the debt, whether such was the intention of the parties or not.

The first question therefore for decision is, whether the debt of the principal debtor was merged.

It is said that if a creditor take a further security from the principal debtor of such a kind and given under such circumstances as to operate as a merger of the original security, the surety is discharged: *DeColyar* on Guarantees, 398; 2 *Chitty* on Contracts, 11th Am. ed., 1160, 1161.

A covenant given to secure an existing debt, irrespective of the intention of the parties, operates in law as a merger of the remedy on the simple contract: *Price et al v. Moulton*, 10 C. B. 561.

The policy of the law is that there shall not be two subsisting remedies, one upon the covenant and the other upon the simple contract by the same creditor, against the same debtor, for the same demand.

Where the subsequent security, although of a higher degree than the previous promise, is taken generally in respect of all sums already advanced or thereafter to be advanced, there is no merger: *Holmes v. Bell*, 3 M. & G. 213.

Merger only takes place where the higher security is given by the same parties for the same debt: *Bell v. Banks*, 3 M. & G. 258; *Norfolk Railway Co. v. M'Namara*, 3 Ex. 628; *Mowatt v. Londesborough*, 3 E. & B. 307, 334; and is strictly *co-extensive* with the remedy on the simple contract *Ansell v. Baker*, 15 Q. B. 20.

The taking of a specialty security from one of two joint and several makers of a promissory note was, in the last case, held not to be *co-extensive* in remedy with that which the creditor had upon the note, and so no merger.

In *Bell v. Banks*, 3 M. & G. 258, 267, Maule, J. said:

"It may be that the taking of a security of a higher nature from one of two *joint* debtors would cause a merger;" but it was unnecessary in that case to decide the point, and in England to this day, according to *Byles on Bills*, 6th ed., 234, note, the point is undecided.

In *Loomis et al. v. Ballard et al.*, 7 U. C. R. 366, 369, where the action was against two defendants on a joint contract, Robinson, C. J., said: "We are all clearly of opinion that in this case the bond of the plaintiffs and Ballard's mortgage clearly shew that if there had been before a simple contract debt due by the two defendants to the plaintiffs on account of the engine, the mortgage giving time for that debt (as it clearly did) extinguished the simple contract debt as regarded Ballard."

But in *Sharpe v. Gibbs*, 16 C. B. N. S. 527, it was held that a mortgage executed by two of three persons jointly indebted to the mortgagee in a simple contract debt, does not operate as a merger of the simple contract debt against the three.

The latter case was cited and approved of in *Gore Bank v. McWhirter*, 18 C. P. 293, 298, but without any reference being made to *Loomis v. Ballard*, 7 U. C. R. 366, 369.

Ansell v. Baker, 15 Q. B. 20, and *Sharpe v. Gibbs*, 16 C. B. N. S. 527, have since been followed in *Boaler et al. v. Mayor et al.*, 19 C. B. N. S. 76.

It is doubtful whether the law of merger, as laid down in *Loomis v. Ballard*, 7 U. C. R. 366, 369, can, since *Sharpe v. Gibbs*, 16 C. B. N. S., 527, and *Boaler et al.*, *v. Mayor et al.*, 19 C. B. N. S. 76, any longer be followed.

In this case it is not necessary to decide the point, for the contracts of the maker and endorser of a promissory note, whether principal and surety or not, are severable, although the contractors are jointly liable to be sued in one and the same action, under our statute as to bills and notes; *Hamilton v. Holcomb*, 12 C. P. 38, affirmed 2 E. & A. 230.

This being so, the present case, we think, falls under the operation of *Ansell v. Baker*, 15 Q. B. 20, rather than

under the operation of *Loomis v. Ballard*, 7 U. C. R. 366.

The doctrine of merger is one of a very technical character, and ought not except in a clear case to be permitted to operate, as it may operate, contrary to the intention of the parties.

A much more serious matter remains. It is clear that so far as the mortgage deed is concerned the time for the payment of the debt thereby secured is not only postponed, but postponed at an increased rate of interest. If the effect of the deed be to prevent the creditor during the postponed time suing the principal debtor on the note, and there be no valid reservation of the rights of the surety, the surety is discharged: *Hooker v. Gamble et al.*, 9 C. P. 434, 12 C. P. 512, 13 C. P. 462; *Darling v. McLean*, 20 U. C. R. 372.

Where by the deed which would otherwise operate as a discharge of the surety there is an express reservation of the remedy against the surety, this necessarily implies that the surety may protect himself by suing the principal, and so the surety, whether he had knowledge of the transaction or not, is not discharged: *Nichols v. Norris*, 3 B. & Al. 41, note; *Cowper v. Smith*, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 12 L. T. N. S. 499; *North v. Wakefield*, 13 Q. B. 536; *Kearsley v. Cole*, 16 M. & W. 128; *Price v. Barker*, 4 E. & B. 760; *Willis v. DeCastro*, 4 C. B. N. S. 216; *Green v. Wynn*, L. R. 4 Ch. 204; *Bateson v. Gosling*, L. R. 7 C. P. 9.

But where the giving of time or other act of discharge results from the language of the deed, can it be shewn by oral testimony that as regards sureties the deed was not by the parties thereto intended to have that effect? This is the second question for our decision.

The question is, in effect, whether the oral agreement that the remedy existing on a different security against the same debtor and a surety or sureties can be said to be *collateral* to the instrument relied upon as containing the giving of time to the principal debtor.

The subject of collateral agreements was much discussed in the Court of Appeal in *Mason v. Scott*, 22 Grant 592.

The result of the authorities, according to the best opinion which I was able to form, and which I expressed in that case, at p. 622, was that an oral agreement, to be collateral to a written agreement, ought not to contain terms which, if inserted in the written agreement, would thereby vary it.

Applying this test to the present case, it may be fairly argued that it is perfectly consistent with the terms of the mortgage extending the time for the payment of the debt *thereby* secured, that the remedy on the *promissory note* then existing as a security for the same debt shall not be affected.

The cases particularly bearing on the point are not quite consistent.

In *Ex parte Glendinning*, Buck 517, 520, the Lord Chancellor Eldon said: "The reservation must be upon the face of the instrument by which the parties make the compromise; for evidence cannot be admitted to explain or vary the effect of the instrument."

In *Cocks v. Nash*, 9 Bing. 341, 348. Gazelee, J., said: "No doubt a deed may be construed as a release or a covenant not to sue according to the intent of the parties, manifested by the contents of the deed; but the plaintiff cannot shew that intent by parol evidence."

In *Molson's Bank v. McDonald*, 2 App. 102, 107, Burton, J. said, "It is a general rule of law that a party, by taking a security of a higher nature in legal operation than the one he already holds, merges or extinguishes his legal remedies upon the pre-existing minor security or cause of action, unless there is something in the instrument itself to shew that it was intended only as a further security, and that the remedy on the pre-existing contract was to remain."

On the other hand, in *Wyke v. Rogers*, 1 DeG. McN. & G. 408, 415, we have the very high authority of Lord St. Leonards, who said: "It is perfectly clear in law that an agreement, that a transaction which would of itself operate

to release the surety shall not have that effect, may be proved by parol evidence."

This language was quoted with approval by the Court of Common Pleas in *Hooker v. Gamble*, 9 C. P. 434, the Court intimating that if the plaintiff were advised that he could bring his case within the principle of *Wyke v. Rogers*, 1 DeG. McN. & G. 408, he should be allowed to do so on application.

In *Wyke v. Rogers*, 1 DeG. McN. & G. 408, the following were the facts: Wyke entered into a bond as a surety. The creditor subsequently took from the principal debtor a promissory note for the amount payable in two months, but afterwards, in consequence of the insolvency of the debtor, sued Wyke on the bond. Wyke then filed his bill to restrain the action, on the ground that he was discharged from liability by the taking of the promissory note. The creditor by his answer denied that this was the effect of the transaction. On the hearing an enquiry was directed in respect of the circumstances under which the promissory note had been taken. The Master reported that although there was not any distinct written, or any distinct parol agreement between the parties, yet there was a general understanding that the giving of the note was not to affect the bond. And it was held, on further directions, that under these circumstances there was no case for the interference of a Court of Equity.

If the principle of this case be applicable here, it is conclusive against the second contention raised by the defendant.

It may be argued that the case of the subsequent security being by deed and not simply a promissory note makes a difference, and the language of the learned Chancellor at p. 416, where he says, "Cases were cited to shew that the reservation of the rights against the surety ought to have appeared on the face of the promissory note; they, however, prove no such thing. They were cases of regular deeds or written instruments; and the Court held that their effect could not be taken away by mere parol

agreement," may be cited in support of the supposed difference.

Boaler et al. v. Mayor et al., 19 C. B. N. S. 76, which has been already mentioned on the question of merger, is also an authority on this point. It shews that the difference does not amount to a distinction.

The action in that case was upon a promissory note for £150 by the holders against the makers, father and son. The father was surety only for the son. The consideration for the note was £150 advanced to the son. The note was dated 7th December, 1863, and was payable on demand, with interest at only £4 10. per annum. On 22nd December, 1863, a deed was executed by the son to the plaintiffs to secure payment of £650, including the £150 represented by the note, but making no reference to it, with interest, at the increased rate of £5 per cent., and not payable till 22nd June, 1864. The deed contained a covenant for the payment of the money. It was submitted that the effect of this deed was to postpone the day for the payment of the £150 by the principal debtor, and so to discharge the surety. But according to the testimony of the plaintiff it was understood that the deed was not to have that effect. The Court held that the surety was not discharged.

Erle, C. J., in delivering judgment, at p. 82, said: "By the deed the mortgage debt was covenanted to be paid on the 22nd June: and the promissory note was payable on demand. The covenant to pay in June operates so that no action shall be brought *thereon* till that time. But there is no engagement on the part of the plaintiffs that they will abstain from pursuing any *other* remedies until then. It seems to me, therefore, that the deed did not operate to give time to the principal."

Montague Smith said, at p. 84: "Upon the evidence of Watson (one of the plaintiffs) which the jury have affirmed, the note was a collateral and additional security." He then expressed the opinion that the rule is the same at law as in equity, and that the rule in equity is correctly laid down in *Wyke v. Rogers*, 1 DeG. McN. & G. 408.

This case is one which is singularly applicable here on all points, and one which we must follow.

Following it we discharge the rule *nisi* in this cause.

Rule discharged.

REGINA V. PRITTIE.

*Temperance Act of 1864—Conviction for selling liquor without license—
Validity of—Powers of Local Legislature.*

In a municipality where the Temperance Act of 1864 was in force, defendant was convicted for unlawfully keeping in his house of public entertainment, known as the Queen's Hotel, liquor for the purpose of sale, &c., without the license therefor by law required.

Held, that the conviction was bad, for that the only conviction that could be valid would be for keeping liquor for sale contrary to sec. 12 of the Temperance Act of 1864, which forbade its being kept, and while in force no license to keep liquors in an hotel could issue.

Semble, that it is *ultra vires* of the Legislature of Ontario to enact that the provisions of the Licensing Acts of Ontario shall have full force and effect in a municipality where the Temperance Act is in force, so as to make the offence against the one an offence against the other.

In Michaelmas Term last, November 23, 1877, Mr. Justice Gwynne, on motion of *H. J. Scott*, granted a rule calling on the prosecutor, Charles C. Pearce, and George Spencer, the Police Magistrate for the town of Owen Sound, the convicting magistrate, to shew cause before the full Court in Term, why a conviction, or a pretended conviction made by the said George Spencer, on the information of the said Charles C. Pearce, whereby the applicant William H. Prittie was convicted, for that he, at the town of Owen Sound, in the county of Grey, on the 4th of August, 1877, did, in his house of public entertainment in the said town, known as the Queen's Hotel, unlawfully keep and have fermented liquors for the purpose of selling, bartering, or trading therein without the license therefor by law required, and

which said conviction, or pretended conviction, was made on the 21st of August, 1877, should not be quashed and set aside in whole or in part, with costs, upon the grounds :

1. That there was no sufficient evidence to sustain the information, and the same should have been dismissed.

2. The Temperance Act of 1864, being proved to be in force in the town of Owen Sound, where the alleged offence of which Prittie was convicted was committed, no conviction could be made under any other Act or Acts, and there was no evidence of any offence being committed under the said Temperance Act of 1864.

3. The Legislature of Ontario has no power in any way to interfere with the provisions of the Temperance Act of 1864, such powers belonging only to the Parliament of the Dominion of Canada, and any attempted interference on the part of the said legislature was *ultra vires* and void, and sec. 30 of 40 Vic. ch. 18, was and is *ultra vires* and void.

4. The last mentioned section does not apply to the offence, it being only introduced to affect the sale of liquor without license, and the offence being keeping liquor for the purpose of sale, barter or traffic.

The information was laid on the 6th of August, 1877. by Charles C. Pearce, License Inspector, before George Spencer, Police Magistrate of Owen Sound. It stated that the informant "is informed and believes that William H. Prittie, on the fourth day of August, 1877, at the town of Owen Sound, in the county of Grey, unlawfully did keep liquor for sale and traffic without the license therefor by law required."

The evidence taken on the 11th of August, given by Mr. Pearce, was as follows:—

"I know the Queen's Hotel, Owen Sound, kept by Mr. Prittie. I was there on the 4th of August. There is a bar-room in the place; it is in a back room that used to be a sample room. I went into the bar-room. I found a bar, shelves, some bottles and decanters on them, tumblers and glasses on the shelf at the back of the door. Found between two and three dozen of Carling's ale, not opened.

I opened one bottle of it and took a sample. That is about all I found in the bar. I went into other rooms, wash-room, &c., then I went down the cellar. In the liquor cellar I found several barrels of ale, some whiskey in a barrel, and some bottles of wine on the shelves. Mr. Prittie went with me and told me what was in the barrels. He said there were three or four barrels of sour ale, and that he had got three or four more instead. He said he had been led to infer that he would not be interfered with or he would not have gone on after the Dunkin Act came in, that he did not keep an open bar for the public, that he kept for travellers, and was trying to build up a summer resort; that he could not be always in the bar, but that sometimes in spite of all, some old soakers would come along and get some. He did not make a practice of selling to every person that came along."

The Dunkin By-law was put in. It was passed on the 11th of October, 1876.

The case was argued by the parties before the police-magistrate, and he adjourned his decision until the 15th, and afterwards until the 21st, when an adjudication was made and the conviction was drawn up the same day. It alleged that "William H. Prittie is convicted before me, George Spencer, police magistrate, in and for the said town of Owen Sound, for that he, the said William H. Prettie, on the fourth day of August, 1877, at the said town of Owen Sound, in his house of public entertainment, known as the Queen's hotel, did unlawfully keep liquor for the purpose of sale, barter and traffic therein, without the license therefor by law required. [Charles C. Pearce, license inspector for the North Riding of the county of Grey, being the informant.] And I adjudge the said William H. Prittie, for his said offence, to forfeit and pay the sum of forty dollars, to be paid and applied according to law; and also to pay the said Charles C. Pearce the sum of three dollars and ten cents for this costs in this behalf. And if the said several sums be not paid forthwith, then I order the said sums to be levied by distress and sale of the goods.

and chattels of the said William H. Prettie, and in default of sufficient distress in that behalf, I adjudge the said William H. Prittie to be imprisoned in the common gaol for the said county of Grey, at Owen Sound, in the said county, for the space of thirty days, unless the said sums and the costs and charges of conveying the said William H. Prittie to the said common gaol should be sooner paid."

During this term, February 19, 1878, *J. K. Kerr*, Q. C. shewed cause. The conviction can be maintained under the Act of 1864. It can also be maintained under the Licensing Acts of Ontario. The words in the conviction as to having and keeping liquors for sale "without the licence therefor by law required," do not prevent the conviction from being a good conviction under the Act of 1864, or under the Licensing Acts. There are licenses where the Act of 1864 is in force, and sections 12 and 13 of that Act speak of such licenses existing where the Act is in force. Under 37 Vic. ch. 32, sec. 25, O., there is no penalty for a violation of that section. Section 35 imposes a penalty for selling liquors; and 39 Vic. ch. 26, sec. 20, amends the above sec. 35. The Act of 1864 is not affected by 39 Vic. ch. 26, sec. 52, O. The Act 40 Vic. ch. 18, sec. 30, O., enacts that the contravention of the Act of 1864 shall also be a contravention of secs. 24 and 25 of 37 Vic. ch. 32, O. By the Act of 1864, sec. 36, the writ of *certiorari* is taken away and the proceedings cannot be removed: see also secs. 16 and 25. The Ontario Legislature can deal with the Dunkin Act: *Mottashed and Corporation of Prince Edward*, 30 U. C. R. 74; *Re Lake and the County of Prince Edward*, 26 C. P. 173. And the Ontario Legislature can also deal with that Act to a very great extent, as connected with Municipal Institutions: *Regina v. Taylor*, 36 U. C. R. 183, 206, 207, 212; *Graham v. McArthur*, 25 U. C. R. 478, 483. It is then objected by the defendant, if this conviction be under the Licensing Acts only, that there is no power to prosecute under these Acts, and to punish under the Act of 1864; that such a course is an assump-

tion to control criminal proceedings by the Ontario Legislature. *Regina v. Boardman*, 30 U. C. R. 553, and other cases shew it is not so. He referred also to *Regina v. Lake*, lately decided by a single Judge, but not reported; *Mitchell v. Brown*, 1 E. & E. 267; *Paley on Convictions*, 5th ed., 152; *Dwarris on Statutes*, 2nd ed., 532; *Re Baker*, 2 H. & N. 219, 244; *Martin v. Pridgeon*, 1 E. & E. 778; *Whitehead v. Smithers*, L. R. 2 C. P. D. 553, 558; *Cooley v. Smith*, 40 U. C. R. 543; *Cooley on Const. Law*, 57, 63; *McCulloch v. Maryland*, 4 Wheat. 316, 428; *Ex parte Duncan*, 16 L. C. Jur. 188, (1872). If necessary, the conviction may be amended by striking out the words, "without the license therefor by law required." *Regina v. Denham*, 35 U. C. R. 503.

Robinson, Q. C., and *Scott*, contra. The Act of 1864, so far as it affects the sale of liquor, or the having it for sale, affects trade and commerce, and is not within the jurisdiction of the Ontario Legislature. When the Dominion Parliament deals with a subject within its powers, and imposes fines and directs a particular course of proceeding for enforcing the enactment, the Provincial Legislature cannot interfere with these proceedings or penalties, or with anything which would affect or defeat the Dominion Legislation: B. N. A. Act sec. 92, sub-sec. 15. The 40 Vic., ch. 18, sec. 30, O., does expressly interfere with the provisions of the Act of 1864, by providing that different proceedings and different penalties shall be taken and imposed than are provided by that Act. This is a conviction by the very terms of it under the licensing Acts. The prosecutor declared he was so proceeding. The 37 Vic. ch. 32, sec. 50, O., provides for a certain state of things being presumed from the existence of certain facts. Under that Act the prosecutor proves his case by virtue of that section, and a conviction is made under the Act of 1864, upon that presumption as evidence, although that Act contains no such provision as to that kind of evidence or presumption which had been used to obtain that conviction. Section 50 just mentioned goes far beyond section 25 of the Act of

1864. There is no appeal by the Act of 1864, to quash a conviction under it. The 37 Vic. ch. 32, sec 25, prevents the keeping of liquors for sale, and the convictions is founded upon that section. But that section differs from section 13 of the Act of 1864. The Act just named has no cumulative punishments. The rule as to convictions is that they should be so certain that the party may know under which of two Acts, both relating to the same matter, the prosecutor is proceeding, and that he may be able to plead it in answer to a future prosecution for the same offence. The conviction is not warranted by sections 30, 31, 32 of the Act of 1864, The two Acts cannot subsist together at the same time and place: *Graham v. McArthur*, 25 U. C. R. 478; and yet the 39 Vic. ch. 26 sec. 27, O., and 40 Vic. ch. 18, sec. 30, declare these Acts shall not affect the Act of 1864, but that they shall all continue operative together at the same time and place. They also referred to *Regina v. Boardman*, 30 U. C. R. 553; *Re Bates*, 42 U. C. R. 284; *Regina v. Hoggard*, 30 U. C. R., 152, 157.

March 15, 1878. WILSON, J.—It may require to be considered yet whether the legislation with respect to the Temperance Acts of 1864 and of Ontario, are an interference with the powers of the Dominion Parliament, which are conferred upon them by the British North America Act, to deal exclusively with matters of trade and commerce.

And if it be, then it must be considered whether the power to interfere to that extent has not been conferred by the same Imperial Statute upon the Ontario Legislature to deal with that subject and to that extent, as connected with and relating to municipal institutions, over which the Provincial Legislature has exclusive jurisdiction; inasmuch as these municipal bodies had, at the time the Confederation Act was passed and took effect, the express legislative right, by the law of Canada, to deal with the sale and keeping of spirituous liquors in the manner and to the extent before mentioned.

If it be held that the Ontario Legislature acquired that power, it must then be considered whether that was, and is an indefeasible right which the Dominion Parliament cannot interfere with or encroach upon. Or whether it was, and is, a power which was given and which is to be exercised so long only as the Dominion Parliament has not, and does not, under its jurisdiction over trade and commerce, pass any conflicting and repugnant law to it, and which is to cease when or be suspended so long as such opposing enactment is maintained.

It must also be considered whether the power in the Dominion Parliament to regulate trade and commerce, and the power of the Ontario Legislature, through the instrumentality of municipal institutions, to deal with spirituous liquors according to the provisions of the Temperance Act, are irreconcilable powers, and must necessarily lead to a conflict of jurisdiction.

That they are antagonistic is manifest; but it may be they are not wholly irreconcilable.

It will be observed that the power which Ontario has over the subject is not that it may, by its own enactments, declare that the provisions of the Temperance Act shall be in force throughout the province, or in any particular part or parts of it; but that the respective municipal bodies may pass by-laws on the subject, which must, before they can take effect, be approved of by a majority of the electors of each municipality.

If the Ontario Legislature had the power to impose, by its own direct legislation, a law upon the country creating and enforcing the terms of the Temperance Acts, such a statute might be irreconcilable with the Dominion authority to deal with trade and commerce.

But it may not be the same thing when the whole of the power which Ontario has so far exercised, is to leave and permit each municipality to put the law into force, and then only after a popular vote upon the by-law approving of it.

It may be said there can be no difference in principle be-

tween the two modes of dealing with the subject, but it may be urged with much reason that there is. In the nature of things it is scarcely possible, and as a fact it is quite improbable, that the Temperance Acts can ever be put in force in the whole Province at the one time, or even over any considerable part of it, so long as a popular approving vote is required in each municipality before the act can take effect.

And it may be contended that if the enforcement of the Temperance Acts be an infringement and encroachment upon the power over trade and commerce, that the Imperial Parliament was quite willing to leave that power with the different municipal bodies still to deal with the subject in question to the extent and subject to the restrictions which the then existing law of the country provided for.

If, however, the exercise of these duplicate powers cannot be maintained because they are a direct interference with trade and commerce, then it must be further considered whether, although an interference with trade and commerce to some extent, and perhaps to a serious extent, the power of the Province cannot, nevertheless, be maintained to authorize the municipalities to put the provisions of the Temperance Act into force as at present, upon the ground that such an Act is a valid exercise of police power inherent in and inseparable from the due administration of civil rights and of matters of a merely local or private nature.

Much may, no doubt, be said on this view of the subject. The argument against the law as it stands at present, may be that prohibition to sell such liquors in quantities of not less than so considerable a measure as five gallons or one dozen bottles at a time, is too excessive a prohibition to be a mere police regulation, and that it is in reality a regulation of trade and commerce. And it may also be argued that the prohibition which excludes all but merchants and traders at their actual places of business from selling even in such quantities, and also all but brewers and distillers

(if the decision of the Supreme Court shall stand) from selling in the like quantities, excludes too numerous a class of persons to be a regulation for the mere purposes of police.

I am at present indicating only and very generally the powers which have yet to be considered upon this difficult perplexing, and very important subject before the parliament, the legislature, or the Courts, can proceed safely to deal with either the public interests or with private rights or responsibilities under these Temperance Acts. I have not been obliged to consider these questions at the present time, because assuming the Temperance Act to be in force as Mr. Kerr contended, and I may assume that on his argument, I am able to dispose of the motion before us upon other grounds. But I am sure we shall be forced to entertain them and to deal with them at no distant day, and all we can do will be to exercise our judgment upon them to the best of our ability, whenever they do arise.

Assuming that the Prohibitory Act is lawfully in force here, as the party shewing cause insists, then is this a valid conviction? It finds that Prittie, the applicant, did, "at the town of Owen Sound, in his house of public entertainment, known as the Queen's hotel, unlawfully keep liquor for the purpose of sale, barter and traffic therein, without the license therefor by law required."

The Temperance Act of 1864, 27 & 28 Vic. ch. 18, sec. 12, uses the words, "Keep for sale," and, "any spirituous or other intoxicating liquor," &c. And it contains also, as a proper part of the section, which should be negatived, "unless it be for exclusively medicinal or sacramental purposes, or for *bona fide* use in some art, trade or manufacture, or as hereinafter authorized by the third or by the fourth sub-section of this section."

By the 37 Vic. ch. 32, sec. 1, liquor is defined to mean "all spirituous and malt liquors," &c. See also 40 Vic. ch. 18, sec. 22. But these provisions do not apply to the Temperance Act. By 37 Vic. ch. 32, sec. 25, it is enacted that "no person shall keep, or have in any house," &c., "any

spirituous, fermented or other manufactured liquors for the purpose of selling, bartering or trading therein, unless duly licensed thereto under the provisions of this Act."

The conviction is more in accordance with this provision.

But the section has no punishment contained in it.

Sec. 35 of the Act, as amended by 39 Vic. ch. 26, sec. 20, by the addition of the words after the word *required* in the 35 section, "or who shall otherwise violate any other provision of this Act, in respect of which violation no other punishment is prescribed," makes the violation of sec. 25 punishable by that amended section.

And that punishment is for the first offence, which this seems to be, "a penalty of not less than \$20 besides costs, and not more than \$50 besides costs." By the Act of 1864, sec. 13, the penalty is "not less than \$20, nor more than \$50"—nothing said of costs as in the Act of 1874.

Under the Act of 1864, there is no appeal when the conviction is by the Police Magistrate and certain other named persons, and the proceedings are not to be removed by *certiorari*.

Under the Act of 1874, sec. 44, sub-sec. 2, an appeal lies to the Judge of the County Court of the county in which the conviction is made.

And by section 50 of that Act, "Any house," &c., "in which are proved to exist a bar," &c., "or preparations similar to those usually found in taverns and shops where spirituous or fermented liquors are accustomed to be sold or trafficked in, shall be deemed to be a place in which spirituous, fermented, or other manufactured liquors are sold, under the 25th section of this Act, unless the contrary is proved by the defendant."

By 39 Vic. ch. 26, sec. 27, the Act of 1864 was to remain in force so far as the provisions of it were within the jurisdiction of the Ontario Legislature. And no tavern or shop license was to be issued to take effect in any municipality in which any by-law prohibiting the sale of liquor under the said Act was in force.

Under the 40 Vic. ch. 18, sec. 23, sub-sec. 2, if the merits

have been tried, the conviction, &c., shall be affirmed, or shall not be quashed, but may be amended. This does not apply to the Act of 1864.

By section 30, it is enacted, "The sale of liquor without license in any municipality where 'The Temperance Act of 1864' is in force shall nevertheless be a contravention of sections 24 and 25 of the said Act, 37 Vic. ch. 32; and the several provisions of the said recited Acts, and of this Act, shall have full force and effect in every such municipality except in so far as such provisions relate to granting licenses for the sale of liquor by retail."

By sub-sec. 2, "A wholesale license to be obtained under and subject to the provisions of the said recited Acts, and of this Act, shall be necessary, in order to authorize or make lawful any sale of liquors in the quantities allowed under the provisions of 'The Temperance Act of 1864.'"

As the Ontario Legislature has power over shop, saloon, and tavern licenses, they had the power to require that a license should be taken out under the Act of 1864, to authorize a sale by wholesale as allowed by that Act. The license would authorize a merchant or trader to sell not less than five gallons or one dozen bottles; and selling without a license, under that Act, the license being required by the 40 Vic. ch. 18, sec. 30, sub-sec. 2, O., would mean that the merchant or trader was selling by *wholesale* without a license.

If he was selling less than these quantities, a license would be no protection to him, and his offence would not consist in selling without the license therefor required by law, but in selling contrary to the statute, that is by selling at all, or contrary to the terms of his license in smaller quantities than he was licensed to sell.

In this case I think it appears sufficiently that the defendant was convicted for keeping liquor in a place where there were licenses required to enable him to keep it for sale, and where it would have been lawful for him to keep it if he had been licensed—that is, that he was acting in vio-

lation of the Licensing Acts by keeping liquor without the proper license, whereas the fact was he was keeping the liquor in a place where the Temperance Act was in force, and while and where he could not be licensed to keep liquor in his hotel under any circumstances.

He was not, therefore, properly convicted for keeping the liquor without the license therefor required by law. He should have been convicted for keeping the liquor for sale contrary to section 12 of the Temperance Act, which forbids its being kept, and which no license could sanction so long as the Act was in force.

The applicant has, in truth, been convicted under 37 Vic. ch. 32, sec. 25, O., which is a licensing Act, for an offence against the Act of 1864. There are costs imposed upon the applicant besides the fine which is sanctioned by the Act of 1874, but not by the Act of 1864. The offence, under the Licensing Acts, may be used against the applicant on a second or third conviction under such Acts, while the conviction under the Act of 1864, cannot be used for the purpose of enhancing the punishment in case of the applicant being hereafter convicted under the licensing Acts.

There is an appeal allowed under the licensing Acts, but not under the Act of 1864, from a police magistrate, such as this is, and the applicant is entitled to know whether he is convicted for an offence and under a statute which permits an appeal to him or not.

There is also a different rule of evidence allowed under 37 Vic. ch. 32, sec. 50, in cases under that Act, which is not allowable in cases under the Act of 1864.

And there is the further objection which I referred to in *Regina v. Lake*, in print but not published yet, that the conviction is under the licensing Acts for an offence alleged to be against these Acts, while in fact it is against the Temperance Act, and that proceeding is assumed to be justified by the 40 Vic. ch. 18, sec. 30, above quoted.

But in my opinion, the Ontario Legislature has not the power to make the provisions of the licensing Acts "have full force and effect" in a municipality where the Temper-

ance Act is in force, so as to make an offence against the one Act an offence against the other Act. That is direct legislation upon criminal law and procedure in criminal matters, which is not in any way necessary for the due exercise of their own proper power.

Why is not the party to be convicted under the statute and for the violation of the statute he has contravened? Why is he, because he has done an act against one statute, to be prosecuted for breaking another he has never infringed?

I think that cannot be done. I am of opinion, then, that the conviction must be quashed for the reasons mentioned.

HARRISON, C. J., and ARMOUR, J., concurred.

Conviction quashed.

During Trinity Term the following Gentlemen were called to the Bar:—

JAMES VERNAL TEETZEL, LYMAN DAVIS TEEPLE, ALFRED HENRY MARSH, THOMAS GIBBS BLACKSTOCK, DUNCAN BYRON MCTAVISH, JAMES WILMOT GORDON, ERASTUS BLAIR STONE, JAMES HENRY MADDEN, JOHN CRERAR, JAMES ALEXANDER MCGILLIVRAY, WILLIAM SETON GORDON, FREDERICK MONTYE MORSON, CHARLES WESLEY PETERSON, HENRY AUBER MACKELCAN, EDWARD H. TIFFANY, THOMAS MERCER MORTON, CHARLES STEPHEN JONES, ELIAS TALBOT MALONE, DAVID STEELE, PHILIP SANDFORD MARTIN, JOHN SECORD, JOHN MELBOURNE KILBOURNE, RICHARD WILLIS JAMESON, ISIDORE FREDERICK HELMUTH.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM MICHAELMAS TERM, 41 VICTORIA, TO HILARY TERM, 41 VICTORIA.

ABANDONMENT.

Of claim — Evidence of.] — See
VOLUNTARY DEED.

ACCIDENT.

Negligence — Contributory negli-
gence.] — See NEGLIGENCE.

ACTION.

By insolvent for cause of action
arising after assignment.] — See IN-
SOLVENCY, 3.

On mortgage — Relief under G. O.
Chy. No. 461.] — See MORTGAGE.

By judgment creditor against
shareholder.] — See RAILWAYS, 2.

By master for seduction of servant
— Damages recoverable.] — See SE-
DUCTION.

AFFIDAVIT.

Of service of notice of motion —
Sufficiency of.] — See CERTIORARI.

On renewal of chattel mortgage —
Sufficiency of.] — See CHATTEL MORT-
GAGE, 1.

On chattel mortgage to secure en-
dorser. — Sufficiency of.] — See CHAT-
TEL MORTGAGE, 2.

AGENT.

Station — Fraudulent receipts is-
sued by — Liability of company.] —
See RAILWAYS, 1.

See CONTRACT — INSURANCE, 3.

AGREEMENT.

See CONTRACT.

ALGOMA.

Commission of Oyer and Terminer
to District Judge — Power to issue.]
— See CRIMINAL LAW, 2.

AMENDMENT.

Of conviction for breach of License
Act.] — See TAVERNS AND SHOPS.

See CERTIORARI.

APPLICATION.

For insurance.—See INSURANCE,
3.

ARBITRATION.

35 Vic. ch. 80, sec. 4, O.—*Arbitration under—Compensation for land and privileges—Interest.*—By 35 Vic. ch. 80, sec. 4, O., the water commissioners of Ottawa, thereby incorporated, are authorized and empowered to enter into and upon any lands, and to survey, set out, and ascertain such parts thereof as they may require for the purpose of the water works, and also to divert and appropriate any spring or stream of water thereon; and to contract with the owners or occupiers of said lands, and those having an interest or right in the said water, for the purchase thereof, or of any part thereof, or of any privilege that may be required for the purpose of the commissioners; and in case of any disagreement between them and the owners or occupiers of such lands, or any persons having an interest in the said water, or the natural flow thereof, or any such privilege as aforesaid, respecting the amount of purchase of value thereof, or as to the damages such appropriation, shall cause to them, or otherwise, the same shall be decided by three arbitrators, to be appointed as there provided. *Held*, that the words “such appropriation” applied to the taking of land as well as a diversion or appropriation of water, and that the arbitrators had power to give damages in all cases of appropriation where the value of the land taken would not be adequate compensation, as in this case.

Held, also, that they were authorized to award interest on the compen-

sation money from the time when the commissioners entered upon and appropriated the land.

The award was also objected to as excessive, but was upheld, there being evidence to justify the amount awarded, and no ground for imputing partiality or legal misconduct to the arbitrators.—*Re Collins and Water Commissioners of Ottawa*, 378.

Insurance—Condition as to arbitration.—See INSURANCE, 1.

See DRAINAGE.

ASSESSMENT AND TAXES.

1. *Tax sale—Certificate—Description of land sold.*—The sheriff, on a sale of land for taxes in 1860, under C. S. U. C. ch. 55, gave to the purchaser a certificate describing the land sold as “five acres of land, to be taken from the south-west corner of the south-west quarter of lot 3 in the 11th concession of the township of East Zorra.” Six years afterwards, the successor of this sheriff gave a deed describing the land particularly by metes and bounds.

Held, that the sale was invalid; for although a certificate was not necessary, yet when given the land must be properly described in it, and must be the same land afterwards conveyed; and here the description was so uncertain that it was not apparent whether it was the same land described in the deed or not.

Held, also, that this was not a defect cured by the 29-30 Vic. ch. 53, s. 156, or 32 Vic. ch. 36, sec. 155. *Burgess v. Bank of Montreal*, 212.

2. *Assessment—Equalization of rates—32 Vic. ch. 36, secs. 71, 74—Quashing by-laws.*—The council of a county, in passing by-laws to levy money

for county purposes in 1877, apportioned the assessment of the different municipalities, not upon the basis of the value according to the rolls as finally revised and equalized for 1876, but according to the rolls for 1877: *Held*, that such by-laws were illegal, being contrary to sec. 74 of the Assessment Act 32 Vic. ch. 36, O., and must be quashed.

Remarks as to the propriety of quashing by-laws when clearly illegal, though the illegality may not be apparent upon their face. *Re Revell and Corporation of Oxford*, 337.

3. *Assessment—Erroneous description of land—Invalid sale—Compensation for improvements—33 Vic. ch. 23, sec. 9, O.*—Certain land was assessed, advertised for sale, described in the warrant, and sold at a tax sale, and conveyed, as part of lot 8—it being in fact part of lot 5. The treasurer, who conducted the sale, described the locality of the land intended to be sold, and the taxes were due on it.

Held, a case within 33 Vic. ch. 23, sec. 9, O., where land having been legally liable to be assessed, had been sold as for arrears of taxes, and such sale, &c., was invalid by reason of uncertain or insufficient description of the land; and that the purchaser was therefore entitled to his purchase money and interest and the value of his improvements, &c.—*Churcher et al. v. Bates et al.*, 466.

Mode of assessment for high schools.—See PUBLIC SCHOOLS.

For drainage purposes.—See DRAINAGE.

ASSESSMENT ROLLS.

See TEMPERANCE ACT OF 1864, 2.

ASSIGNMENT.

Of foreign judgment for costs of defence.—See INSOLVENCY, 2.

Of policy to mortgagee—Payment of mortgage—Forfeiture by assignor.—See INSURANCE, 2.

In insolvency—Action by insolvent after.—See INSOLVENCY, 3.

ASSIGNEE.

In insolvency—Rights of.—See INSOLVENCY, 2.

ASSIZE.

Courts of—Authority to issue commissions for.—See CRIMINAL LAW, 2.

ATTORNEY.

Acceptance of service—Effect of.—See CERTIORARI.

AVERAGE.

General—Vessel stranding.—See INSURANCE, 4.

AWARD.

See ARBITRATION.

BARRISTERS CALLED.

349, 625.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Bill of exchange—Personal liability.—The defendant, the inspector of an insurance company, having arranged with the plaintiff as to the amount of the plaintiff's claim for a loss, gave the plaintiff the following bill:—

"\$875. To the Beaver and Toronto Fire Insurance Company.

"Toronto, November 6, 1876.

"Three months after date pay to the order of John Hagarty, at the Ontario Bank here, \$875, being payment in full of his claim under policy No. 71,514, for loss and damage by fire on the 27 of October last.

(Signed) A. SQUIER, *Inspector.*"

It was found as a fact that the plaintiff did not suppose that defendant would be, nor did defendant intend to make himself, liable: that the actual bargain was, that the plaintiff should get a bill on which the company would be, but that there was no express agreement or understanding that defendant should not be, liable. *Held*, that defendant was personally liable. *Hagarty v. Squier*, 165.

Note for premium—Non-payment of—Estoppel.—See INSURANCE, 3.

Chattel mortgage to secure endorser—Recital—Affidavit.—See CHATTEL MORTGAGE, 2.

Promissory note—Subsequent acceptance of mortgage—Reservation of remedy.—See PRINCIPAL AND SURETY.

BILL OF LADING.

See STOPPAGE IN TRANSITU.

BUILDINGS.

Situation of adjoining—Survey by agent—Estoppel.—See INSURANCE, 3.

BY-LAWS.

Illegally passed for equalizing rates—Defect not appearing on face of—Quashing.—See ASSESSMENT AND TAXES, 2.

Quashing where omission to give due notice of polling—Right of electors to shew cause—See TEMPERANCE ACT OF 1864, 1.

Refusal to quash where result not affected by objections.—See TEMPERANCE ACT OF 1864, 2.

Establishing highway.—See WAYS, 1.

CALLS.

On stock—Discharge in insolvency—Plaintiff's claim not mentioned—Action.—See INSOLVENCY, 1.

CERTIFICATE.

On sale of land for taxes—Necessity for—Description of land.—See ASSESSMENT AND TAXES, 1.

For costs—Power of Court to grant.—See COSTS.

CERTIORARI.

Notice of motion—Affidavit of service—Waiver.—The affidavit of service of notice of motion for a *certiorari* to remove a conviction, must identify the magistrates served as the convicting magistrates. But an affidavit defective in this respect was allowed.

to be amended, the time for moving for the *certiorari* not having expired.

Such an objection was held not to be waived by the attorney having accepted service for the convicting justices, and undertaken to shew cause.

The notice need not be served on the private prosecutor. *Re Lake*, 206.

Removal by, of indictment for non-repair of road.—See *WAYS*, 3.

CHATTEL MORTGAGE.

1. *Statement and affidavit on renewal.*—*Held*, following *Walker v. Niles*, 18 Grant 210, and dissenting from *O'Halloran v. Sills*, 12 C. P. 465, that on the renewal of a chattel mortgage the statement and affidavit may, when they refer to each other and are meant to be read together, be so read; and that if together they contain the particulars required by the statute the renewal is sufficient.

In this case the statement was "statement shewing the amount still due on a chattel mortgage made by," &c., (mentioning the names of the parties, and date of registry); "amount of mortgage \$685; one year's interest at 20 per cent. \$137; amount still due \$822," and subjoined was an affidavit by the mortgagee verifying a copy of the mortgage annexed, and stating, "the above statement shews truly and correctly the interest I still have in the said mortgage and the amount still due thereon. * * The said mortgage has not been and is not kept on foot for any fraudulent purpose." *Held*, sufficient. *Barber v. Maughan*, 134.

2. *Chattel mortgage to secure indorser—Recital—Affidavit.*—A chattel mortgage recited that the mortgagee

had endorsed at the request and for the accommodation of the mortgagors a certain promissory note bearing even date therewith, and payable three months after date to C. B., or order, for \$1000. The proviso and covenant was to pay the said note at maturity, and save harmless the said mortgagee against his endorsement thereof.

The affidavit of the mortgagee stated that he endorsed the promissory note in the mortgage named: "that the said mortgage was executed in good faith, and for the express purpose of securing the due payment of the said promissory note, and security and indemnity to me against the said endorsement or any loss thereby, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said mortgagors therein named, or preventing the creditors of such mortgagors from obtaining payment of any claim against the said mortgagors."

Held, that if necessary the agreement between the parties was sufficiently set forth in the mortgage and verified in the affidavit; but *quære*, whether this is required except in the case of an agreement for future advances.

Held, also, that the affidavit was otherwise sufficient, though not in the exact words of the statute. *O'Donohoe v. Wilson*, 329.

See *PRINCIPAL AND SURETY*.

COMMISSIONER.

Appointment of District Judge as, under C. S. U. C. ch. 11, sec. 2.—See *CRIMINAL LAW*, 2.

COMPANY.

Acceptance of officer of—Personal liability.]—See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

Railway—Liability on fraudulent receipts issued by agent.]—See **RAILWAYS, 1.**

Action by judgment creditor against shareholder.]—See **RAILWAYS, 2.**

Road—Neglect to repair—Indictment—R. S. O. ch. 152.]—See **WAYS, 3.**

COMPENSATION.

For land and privileges.]—See **ARBITRATION.**

For improvements—Invalid tax sale.]—See **ASSESSMENT AND TAXES, 3.**

COMPOSITION AND DISCHARGE.

Plaintiff's claim not mentioned in schedule—Action for calls on stock—Right to recover.]—See **INSOLVENCY, 1.**

Cause of action accrued after assignment—Action by insolvent.]—See **INSOLVENCY, 3.**

Goods obtained by fraud—Right to sue for—Estoppel.]—See **INSOLVENCY, 4.**

CONCEALMENT.

See **INSURANCE, 3.**

CONDITIONS.

Insurance—Statutory conditions—Power of Provincial Legislature.]—See **INSURANCE, 1.**

See **INSURANCE, 3.**

CONSIDERATION.

Executed.]—See **CORPORATIONS.**

See **VOLUNTARY DEED.**

CONSTITUTIONAL LAW.

See **INSURANCE, 1—TEMPERANCE ACT OF 1864, 3.**

CONTRACT.

Contract to deliver wheat f. o. b. the cars—Duty to provide cars—Contract by telegrams.]—Plaintiff, through his agent at Seaforth, early in September offered defendant 94c. a bushel for his wheat f. o. b. at Clinton, where defendant lived, a station on the same line of railway as Seaforth. This was not then accepted, and on the 9th of September defendant offered to take that price, but plaintiff did not then want the wheat. On the 11th of September plaintiff telegraphed defendant:—“Will take your wheat at 94 cents, f. o. b. Answer.” On the same day defendant answered “Will accept your offer 94. Send directions about shipping.” *Held*, that the words, “Send directions about shipping,” did not qualify the previous unconditional acceptance, and that there was a complete contract.

Held, also, that under such a contract it was the duty of the buyer to provide the cars: that the defendant in this case not having done so within a reasonable time, could not recover for non-delivery of the wheat; and that there was no evidence of a usage or custom to the contrary, even if such usage could be received to vary the contract.

Semble, that the explanation of the alleged usage was that the sellers, in providing cars at Clinton under such contracts, were acting as agents for the buyers. *Marshall v. Jamieson*, 115.

See CORPORATIONS.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.—WAYS.

CONVEYANCE.

Voluntary.—See VOLUNTARY DEED.

CONVICTION.

Joint, for keeping liquor for sale without license—Validity—Amendment.—See TAVERNS AND SHOPS.

For selling liquor without license where Temperance Act, 1864, in force—Validity—Power of local legislature.—See TEMPERANCE ACT OF 1864, 3.

See CERTIORARI—HUSBAND AND WIFE, 2, 3.

CORPORATIONS.

1. *Contract—Ultra vires—Executed consideration.*—The defendants, a street R. W. Co., entered into an agreement on the 29th December, 1874, before their road was in operation, with the Grand Trunk R. W. Co., to carry freight for that company between the town of Sarnia and Point Edward, and in April, 1875, their road being still unfinished, they, in order to fulfil their contract, agreed with the plaintiff, a

steamboat owner, for the transportation of merchandise by water between these points until their railway should be opened. The plaintiff performed the service, and the defendants received payment from the G. T. R. W. Co. therefor. It was objected that the defendants had no power to make the contract with the plaintiff, and that he therefore could not recover; but, *Held*, that to the extent to which the defendants had so benefited by the plaintiff's services they were liable to him, and should not be allowed to raise the objection of *ultra vires*. *Clarke v. Sarnia Street R. W. Co.*, 39.

2. *City corporation—Work done on parol contract—Liability for.*—The plaintiff tendered, in February, 1875, to the defendants, the corporation of a city, for certain work to be done in improving a hill. The tender was accepted by the city engineer, and the work done between May and August, amounting to \$890. A by-law was passed in May to raise money for the improvement of this hill, and other purposes. In the estimates for 1876, \$5,000 was provided for as the balance for this hill, and in October a by-law was passed directing debentures to be issued to raise this sum with the other moneys required for the year. *Held*, that the plaintiff might recover, the claim having been approved of, and provided for by defendants.

The plaintiff, under a contract with the water commissioners of the city, a body distinct from the defendants, was to do certain excavation for them, and to remove the material to a distance not more than 300 feet. The engineers of the commissioners, having first received the approval of the Chairman of the Board of Works,

directed the plaintiff to break up this excavation, a good deal of it being rock, and to deposit it in thin layers on the arches of and approaches to a bridge within 300 feet. The work so done, in breaking up and spreading the stone, amounting to \$558, was a benefit, and was necessary to complete the bridge according to its original plan, but there was no order of council or minute of the Board of Works authorizing it: *Held*, that defendants were not liable. *Gibson v. Corporation of Ottawa*, 172.

See WAYS, 4.

COSTS.

Certificate for costs—Power of Court to grant—R. S. O. ch. 50, secs. 345-8.]—Where a verdict for substantial damages is subsequently reduced by the Court to a nominal sum, the Court has power under secs. 345-8, of R. S. O. ch. 50, to grant a certificate for costs; but the motion must be made when the judgment reducing the verdict is delivered, or before the rule absolute is issued, unless the matter is postponed to a future day.

In this case the judgment reducing a verdict for \$1,000 to nominal damages, was delivered on the judgment day after the Easter term, but no certificate was then moved, and the rule absolute issued without one.

The Court, notwithstanding the delay, as the practice was new, granted the certificate on a motion made in the following term, and directed the rule absolute to be re-issued with a certificate embodied therein. *Drifill v. McFall*, 597,

See INSOLVENCY, 2—TEMPERANCE ACT OF 1864, 2.

COUNTY COURT.

Judge—Power of.]—See CRIMINAL LAW, 1.

COURT.

Power to grant certificate for costs.]—See COSTS.

County Judge—Power of.]—See CRIMINAL LAW, 1.

Oyer and Terminer—Assize—Authority to issue commission to District Judge]—See CRIMINAL LAW, 2.

COVENANT.

Mortgage payable by instalments—Covenant to pay the whole on default.]—See MORTGAGE.

CREDITOR.

Judgment—Action against shareholder.]—See RAILWAYS, 2.

CRIMINAL INFORMATION.

See DEFAMATION.

CRIMINAL LAW.

Criminal trial by C. C. Judge.]—*Held*, that a County Court Judge trying a prisoner summarily under 32-33 Vic. ch. 35, D., has the same authority to convict of an offence under 32-33 Vic. ch. 21, sec. 110, D., instead of that charged, as a jury has. *Regina v. Haines et al.*, 208.

Provisional District of Algoma—Commission of Oyer and Terminer to District Judge—Power to issue.]

—*Held*, that the Crown, by prerogative right, could issue a commission to the Judge of the Provisional Judicial District of Algoma to hold a Court of Oyer and Terminer, and General Gaol Delivery, for trial of felonies, &c.

Semble, per WILSON, J., that such Judge having by sec. 94 of C. S. U. C. ch. 128, the same powers and duties as a County Judge in Upper Canada, he might have been appointed under C. S. U. C. ch. 11, sec. 2, to act as commissioner.

Semble, also, that the Lieutenant-Governor of Ontario, as well as the Governor-General, has the power to issue commissions to hold Courts of Assize. *Regina v. Amer et. al.*, 391.

See DEFAMATION.—DEMURRER.—HUSBAND AND WIFE, 2, 3.—LANDLORD AND TENANT, 2.

CROPS.

See HUSBAND AND WIFE, 1.

CUSTOM.

See CONTRACT.

DAMAGES.

See ARBITRATION—COSTS—SEDUCTION.

DEBT.

Antecedent—Endorsement of bill of lading for.—See STOPPAGE IN TRANSITU.

DEBTORS.

Joint—Taking specialty security from one—Whether merger.—See PRINCIPAL AND SURETY.

DECEIT.

Fraudulent receipt of station agent—Liability of company.—See RAILWAYS, 1.

DEDICATION.

See WAYS, 1.

DEED.

Tax sale—Description of land.—See ASSESSMENT AND TAXES, 1, 3.

Composition and discharge.—See INSOLVENCY, 1, 3, 4.

Voluntary.—See VOLUNTARY DEED.

See LIMITATIONS, STATUTE OF.

DEFAMATION.

Libel—Criminal information—Misdirection—Rejection of evidence—Grounds not taken in rule.—The defendant, having been convicted on a criminal information for libel, obtained a rule *nisi* for a new trial for the rejection of evidence, and for misdirection in ruling that there was no evidence to support the pleas of justification. Upon this rule coming up for argument the Court, under the circumstances, as a matter of indulgence, allowed to be argued, another ground of misdirection, not taken to the charge at the trial, in ruling that the libel implied malice, whereas the jury should have been told that, it being a privileged communication, the inference of malice was repelled.

The rule requiring any objections to the charge to be taken at the trial, applies in criminal as well as civil proceedings.

The learned Judge at the trial told the jury that the defendant must prove all the charges which he had justified: that the evidence fell far short of doing so, and that in his opinion they should find the pleas of justification against the defendant.

Per HARRISON, C. J., this was not so much a direction on the law as a strong observation on the evidence, and therefore not open to the objection of misdirection. But if so open, there was no misdirection, for the defendant was bound to such proof, and the observation was justified by the evidence, set out in this case.

Per WILSON, J.—There was evidence, upon the facts stated below, to go to the jury in support of the pleas of justification; and the defendant was entitled to a new trial for the misdirection.

The libel which formed the subject of the first count, began by saying, "The party referred to by us as the head of a public institution, who purchased three votes at the time of the crisis, is the Hon. J. S.," the prosecutor. The second count was upon an alleged libel in which, besides specific charges against the prosecutor, he was said to be the most corrupt man in Canada. *Per* HARRISON, C. J., the defendant was not entitled to put in evidence an article in a previous issue of his paper, charging the prosecutor with political intriguing, &c., on which a criminal information had been refused to the prosecutor; nor a letter written to the prosecutor alleged to be a request to supply money to be used for corrupt purposes, there being no evidence tendered of anything done by him in pursuance of such letter. *Per* WILSON, J., such evidence was admissible; but as it was not formally pressed the rejection of it formed no

ground for a new trial. *Regina v. Wilkinson*, 492.

DEMURRER.

Certiorari.]—The proper mode of objecting to an indictment for non-repair of a road is not by demurrer, but by moving it up by certiorari and moving to quash upon affidavits shewing the facts. *Regina v. Ottawa and Gloucester Road Co.*, 478.

DEPARTURE.

In pleading.]—See INSOLVENCY, 4.

DESCRIPTION.

Of land sold for taxes.]—See ASSESSMENT AND TAXES, 1, 3.

DISCHARGE.

Of surety—Promissory note—Subsequent acceptance of mortgage—Reservation of remedy.]—See PRINCIPAL AND SURETY.

See COMPOSITION AND DISCHARGE.

DISCONTINUANCE.

See LIMITATIONS, STATUTE OF.

DIVIDENDS.

See INSOLVENCY, 4.

DRAINAGE.

Drainage works—36 Vic. ch. 48, secs. 452, et seq., O—Arbitration—

Report.]—The township of Rochester having determined to construct certain drainage works in the township, under secs. 447–463, inclusive, of the Municipal Act of 1873, procured plans and estimates by a surveyor, who reported that two other townships, Gosfield and Mersea, and Tilbury West, would be benefited, and assessed them for a certain amount, and that certain county roads would also be benefited, for which he assessed the county \$5000, and a railway company \$200.

Held, there being several municipalities assessed for the work, that there should have been one arbitration between all interested; and an award made upon a reference between the county and the township of Rochester only was set aside.

Held, also, that the county roads, though on a higher level than the township of Rochester, might be charged with a proper proportion of the expense under section 452.

Held, also, that the engineer should report definitely specifying the particular roads benefited, not stating a lump sum for roads generally; but *semble*, that such objection should not be entertained, not having been pressed at an arbitration between the township and the county, at which the amount assessed against roads had been reduced.

Held, also, that the report must state the different lots assessed, and the sum assessed against each, and should state that these sums were in the surveyor's opinion the proportion of benefit to be derived from such drainage.

Remarks as to the proper mode of proceeding in such matters. *Re Corporation of Essex and Corporation of Rochester*, 523.

EASEMENTS.

See LIGHTS.

EJECTMENT.

Notice of title.]—*See* WILL.

ELECTORS.

When entitled to shew cause to rule to quash by-law.]—*See* TEMPERANCE ACT OF 1864, 1.

ENDORSEMENT.

Of bill of lading.]—*See* STOPPAGE IN TRANSITU.

ENGINEER.

Report of under 36 Vic. ch. 48, sec. 452, et seq.]—*See* DRAINAGE.

ESTOPPEL.

Tenant shewing landlord's title determined — Sheriff's sale.]—*See* LANDLORD AND TENANT, 1.

Fraudulent receipts of station agent — Liability of company.]—*See* RAILWAYS, 1.

Ejectment—Notice of title.]—*See* WILL.

See CORPORATIONS, 1. — INSOLVENCY, 4.—INSURANCE, 3.

EVIDENCE.

Rejection of.]—*See* DEFAMATION.

Of negligence—Contributory negligence.]—*See* NEGLIGENCE.

See ARBITRATION—CONTRACT—
HUSBAND AND WIFE, 2—INSURANCE,
3, 4—JUDGMENT—LANDLORD AND
TENANT, 2.—WAYS, 4,

EXECUTION.

See HUSBAND AND WIFE, 1.

F. O. B.

See CONTRACT.

FORECLOSURE.

See MORTGAGE.

FOREIGN JUDGMENT.

Proof of.—*See* JUDGMENT—IN-
SOLVENCY, 2.

FRAUD.

Of station agent in issuing receipts
—*Liability of company.*—*See* RAIL-
WAYS, 1.

GATE.

Right to remove.—*See* WAYS, 2.

GENERAL AVERAGE.

Deck load—Wages—Provisions—
Repairs.—*See* INSURANCE, 4.

GOODS.

See STOPPAGE IN TRANSITU.

HIGH SCHOOLS.

See PUBLIC SCHOOLS.

HIGHWAYS.

See WAYS.

HUSBAND AND WIFE.

1. *Married woman*—*C. S. U. C. ch.*
73—*Right to crops.*—A married
woman, married before 1859, with-
out any settlement, owned land about
a mile from the farm on which she
was living with her husband. The
husband who managed this land
sowed it with hay, the seed being
his own, and the crop was afterwards
cut at the expense of the wife, and
taken to the husband's farm, where
it was kept separate from his hay.
Held, that the hay belonged to the
wife, and was not seizable under an
execution against the husband. *Lett*
v. Commercial Bank, 24 U. C. R.
552; *Harrison v. Douglas*, 40 U. C.
R. 410; and *Irwin v. Maughan*, 26
C. P. 455, distinguished. *Plows v.*
Maughan, et al., 129.

2. *Husband and wife*—*Duty of hus-*
band under 32-33 Vic. ch. 20, sec. 25
—*Conviction—Evidence.*—An in-
dictment under 32-33 Vic. ch. 20,
sec. 25, alleged that E. S. was the
wife of defendant, and was willing to
live with him as such: that it was
defendant's duty to provide the ne-
cessary food, clothing, and lodging
for her sustenance; and that he, on,
&c., and from thence hitherto, un-
lawfully, wilfully, and without lawful
excuse, did refuse and neglect to
provide the same, contrary to the
statute, &c.: *Held*, that the allega-
tion that she was ready and willing
to live with defendant was surplus-

age, and need not be proved; but that it must be shewn that she was in need, and that the defendant had the ability to supply her wants; and as this did not sufficiently appear by the evidence a conviction was set aside. *Regina v. Nasmith*, 242.

3. *Married woman—Conviction of—Sale of liquor—37 Vic. ch. 32, sec. 35, O.*—Where the husband, the occupant of the house in which the sale took place, was in gaol: *Held*, that his wife might be convicted under 37 Vic. ch. 32, sec. 35, O., for selling liquor there without license. *Regina v. Williams*, 462.

Costs recovered by wife—Right of husband's assignee to.—See **INSOLVENCY**, 2.

ICE.

On sidewalk.—See **WAYS**, 4.

IMPROVEMENTS.

Compensation for—Invalid tax sale.—See **ASSESSMENT AND TAXES**, 3.

INDICTMENT.

For neglect to repair road—Removal by certiorari.—See **WAYS**, 3.

See **HUSBAND AND WIFE**, 2.

INDORSER.

Chattel mortgage to secure—Recital—Affidavit—Sufficiency of.—See **CHATTEL MORTGAGE**, 2.

INSOLVENCY.

1. *Discharge—Pleading—Plaintiff's claim not mentioned.*—The

plaintiffs sued defendant as a shareholder in their bank for calls, and defendant pleaded his discharge under the Insolvent Acts of 1869 and 1875, the assignment having been made under the former, and the deed of composition and discharge filed under the latter Act. It appeared that the only mention of the plaintiffs' claim in defendant's statement of affairs and schedule was this entry in the statement of assets, "25 shares St. Lawrence Bank stock; amount paid up \$500": *Held*, that the plaintiffs' claim was not discharged. *Standard Bank of Canada v. Johnson*, 16.

2. *Foreign judgment for costs of defence—Assignment of—Insolvency of defendant—Rights of his assignee—Proof of judgment.*—In an action on a foreign judgment, it appeared from the roll that the judgment was on a bill of complaint brought in the State of New York, against S. and his wife, by one Saxton (the now defendant,) to set aside a certain conveyance made to the wife as fraudulent, and that such bill was dismissed with costs to be paid by the plaintiff, (the now defendant.) It appeared also that the suit was substantially against the wife, her property being in dispute, and that her husband was joined for conformity only. An assignment of the judgment was produced from S. and wife to the now plaintiff, and a previous assignment, during the pendency of the foreign suit, of all costs accrued or that might accrue. It was admitted on behalf of the now plaintiff, that at the execution of the assignment S. was an insolvent under the Act of 1869, and that the now plaintiff was the attorney of S. and his wife in the foreign Court.

Held, that the plaintiff was entitled to recover, for *primâ facie* the costs for which the judgment was recovered were incurred and recovered by the wife, and did not pass to the assignee of her husband.

Held, also, upon the evidence set out below, that the judgment was properly proved, for the certificate shewed the person certifying to be the clerk and the seal to be the seal of the Court. *Hughitt v. Saxton*, 49.

3. *Insolvent Act of 1875—Deed of composition—Confirmation of—Action by insolvent after assignment.*]—To a declaration on the common counts, defendant pleaded that the plaintiff before action assigned, under the Insolvent Act of 1875, to an official assignee, in whom the alleged cause of action became vested. Second replication, that before action the assignee, in conformity with a deed of composition and discharge duly executed by the requisite proportion in number and value of the plaintiff's creditors, by deed duly transferred to the plaintiff all the estate vested in the assignee. Rejoinder, that the discharge was not duly confirmed by the Court or a Judge.

Held, on demurrer, replication bad, for not shewing that the discharge was confirmed, without which, by sec. 66 of the Act, it could have no effect; and that the rejoinder was good. *Semble*, that the replication should have alleged also that the creditors signing had proved their claims, and represented at least three-fourths in value of the claims of \$100 and upwards which had been proved, as required by secs. 49 and 52.

The third replication was, that the causes of action were for goods bargained and sold by plaintiff to defen-

dant after the assignment, and that the assignee had not interfered or required the defendant to pay him. *Held*, good. *Graham v. McKernan*, 368.

4. *Insolvent Act of 1875—Deed of composition and discharge—Estoppel.*]—Declaration on promissory notes, and on the common counts, alleging at the end of each count that the imprisonment of the defendant is permitted for enforcing payment: that the defendant, being a trader, purchased goods from the plaintiffs, and gave the notes declared on for part of the price, knowing and concealing from the plaintiffs the fact that he was unable to meet his engagements, with intent to defraud them, &c. Plea, that defendant having become an insolvent under the Act of 1875, the plaintiffs proved their claim on his estate: that defendant procured a deed of composition and discharge duly executed by the requisite proportion of his creditors in number and value (setting it out) whereby in consideration of 30 cents in the \$, which defendant and three sureties for him covenanted to give their notes for and to pay, the creditors released their claims against the defendant, and authorized the assignee to give up to him his estate: that the plaintiffs had notice of and made no objection to this deed, which was duly confirmed by the Judge, and that they accepted the notes for the composition, and received payment of one of them. Replication, that the imprisonment of defendant is permitted in respect of the causes of action declared on, and that the plaintiffs did not consent that the discharge pleaded should apply to these debts. Rejoinder, that the plaintiffs' claim was set forth in the list and proved by them as an ordi-

nary debt, not as one for which defendant ought to be imprisoned, or to which a discharge under the Act would not apply without their consent; nor did they claim that it was such a debt, nor that they could receive a dividend from the defendant's estate without being affected by the discharge. And the plaintiffs, with notice of all the facts on which they now charge that defendant may be imprisoned, appeared at the first meeting of defendant's creditors and proved their claim, and voted thereat as ordinary creditors therefor. And the defendant and his sureties, believing it to be such a claim, and having no notice to the contrary, covenanted to pay the composition, and the plaintiffs accepted the notes therefor, one of which has been paid to them, whereby the plaintiffs' claim is discharged, and they are estopped from this action.

Held, on demurrer, WILSON, J., dissenting, that the plea and rejoinder were good, and the replication bad, for that the plaintiffs, under the facts stated, had precluded themselves from enforcing their claim.

Held, also, that the rejoinder was not a departure from the plea. *McMaster et al. v. King*, 409.

[This case has been reversed on Appeal. Not yet reported.]

INSURANCE.

1. *Insurance Cos. — Powers of Provincial Legislature — Statutory conditions*—39 Vic. ch. 24, O.—*Reference to arbitration.*—*Held*, that the 39 Vic. ch. 24, O., was binding on an insurance company incorporated by the Dominion Parliament, as regarded an insurance effected by them in Ontario; and was not beyond the powers of the Provincial Legislature.

Where such a policy contained conditions differing altogether from those prescribed by that Act: *Held*, per HARRISON, C. J., that it must be treated either as containing no conditions, or the statutory conditions only. Per WILSON, J., that the statutory conditions not being printed on the policy, as directed by the Act, could not be deemed part of it as against the insured.

Per HARRISON, C. J.—No. 15 of the statutory conditions does not make the reference to arbitration a condition precedent to an action; and the provision in this policy for payment, "after the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy," if not nugatory as an attempt to vary the statutory condition, was not a reasonable condition.

Per HARRISON, C. J.—Under that condition the Judge at the trial might try the question of liability, and refer the amount to be ascertained in the manner there provided.

Remarks by WILSON, J., as to the further protection now required to be provided for the insurers. *Ulrich v. National Ins. Co.*, 141.

2. *Policy of insurance—Assignment to mortgagee — Payment of mortgage—Forfeiture by assignor.*—The plaintiffs sued on a mutual fire insurance policy granted to one F., for \$2,000 on certain property mortgaged by him to the plaintiffs, alleging that defendants covenanted with the plaintiffs to pay to F., or his assigns, all loss not exceeding \$2,000; and that as to \$400, the plaintiffs sued in their own right, and as to the remaining \$1,600, as trustees for F. The defendants pleaded that after F. assigned the

policy to the plaintiffs, he paid to them the whole of their mortgage pursuant to the condition on which it was assigned, and that before the loss F. was duly assessed on the premium note, and neglected to pay, by which the policy became void. The condition on which the policy was assigned was, that on payment of the mortgage money by F. to the plaintiffs the assignment should be void: *Held*, that the plea shewed a good defence, for the performance of the condition put an end to the plaintiffs' title, and as F. could not have recovered, neither could the plaintiffs as trustees for him. *Oxford Permanent Building and Savings Society v. Waterloo County Mutual Fire Ins. Co.*, 181.

3. *Conditions — Warranty—Concealment of material fact—Situation of adjoining buildings—Survey made by defendants' agent—Non-payment of note for premium — Estoppel.*—A policy on four dwelling houses provided that all statements contained in the application, which must be in writing and signed by the applicant or by his authority, would be taken to be warranted by the assured, and "if any misrepresentation or concealment of facts has been made in the application, or if he (the applicant) shall in any manner make any attempt to defraud this company, the policy shall be void." The defendants in their plea, after setting out this condition, alleged that the insured concealed from them the fact that the insured premises were near to and immediately opposite to a blacksmith shop, which fact was one material for the consideration of the risk attending the application; and that by reason of such concealment the policy became void.

At the foot of the application it was agreed that the survey and diagram should form a part of the contract, and that if the agent of the company filled up the application he should in that case be the agent of the applicant, and not of the company.

It appeared that in answer to a question in the application "External exposures. What is the distance, occupation, and materials of all buildings within one hundred feet?" the distance of certain buildings from those insured was stated, and a sketch was given on the back shewing their position. The insurance was effected through the defendants' agent, who with the husband of the insured measured the distance from the other buildings, and told him that it was unnecessary to put in a blacksmith's shop on the other side of the street, eighty-six feet distant.

Held, WILSON, J., dissenting, that the plea was not proved, for the defence was not put upon the ground of warranty, but on the concealment of a material fact; and according to the evidence there was no concealment, nor was the blacksmith's shop material to the risk. *Per* WILSON, J.—The plaintiff was bound by the application, and it must be inferred that the fact was material and was agreed to as such by the parties.

Another condition was, that where credit was given and a note taken for the premium, unless the same should be paid at maturity the policy should be void. And the defendants set up non-payment as a defence under this condition.

The insured and her husband gave the agent a note for the premium, payable in three months. The agent left the application with the hus-

band, telling him, as he was in a hurry, to sign his (the agent's) name to it, and send it to the defendants, which the husband did, with a letter, asking defendants to let him know when the note came due. They acknowledged it, and sent the policy to him. The day after the note fell due the husband wrote to defendants asking if they held the note, and if the policy was good without being countersigned by the agent. In answer defendants' secretary wrote on the 8th March (saying nothing about the policy), that the agent was an impostor, that "we are trying to get on his track, and may be able to write you further on this subject again. Your note never came here, and I advise you not to pay it whoever should call on you for the same." The fire took place in September. After some correspondence, defendants in December refused to pay, giving, for the first time, as one reason the non-payment of the note; and the Secretary at the trial swore that the note not having been paid they considered the policy cancelled when they wrote on the 8th May.

Held, that defendants were clearly estopped by that letter from setting up this defence. *Benson v. Ottawa Agricultural Ins. Co.*, 282.

4. *Marine insurance—Deck load* —"*Steam barge*"—*Vessel stranding* —*General average—Items recoverable.*—A marine policy upon a vessel described as a "steam barge" was warranted by the assured "to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge." There was nothing else in the policy as to the vessel insured carrying a deck load: *Held*, that the "barge" mentioned in the policy did not mean the insured

vessel, nor did it refer to a steam barge.

The vessel went ashore on Lake Huron, and was beached, after throwing out part of the cargo, as the only means, in the judgment of the captain, of saving all concerned.

Held, that the plaintiff was entitled to recover for the deck load as for general average, it not being excluded by the condition above mentioned, and there being evidence of a custom on the lakes for steamers to carry such loads, and to deal with them as subject to general average.

Held, also, that the plaintiff was not entitled to recover from the defendants for the wages and provisions of the crew while the vessel was stranded, and in endeavouring to get her off the beach, even though the damage done to the vessel was itself a ground for general average.

Held, also, that defendants were liable for the value of the repairs rendered necessary by the stranding, whether it was a general average loss or not, for it was a loss by perils of the sea.

Held, also, that the plaintiff was entitled to recover from defendants the proportion charged against the cargo and freight, and was not himself obliged to collect the share, if any, of general average stated against the owners of the cargo. *Steinhoff v. Royal Canadian Ins. Co.*, 307.

INTEREST.

On compensation awarded.—See ARBITRATION.

See ASSESSMENT AND TAXES, 3.

JOINT DEBTORS.

Taking specialty security from one—Whether merger.—See PRINCIPAL AND SURETY.

JUDGE.

County Court—Power of on summary trials.—See CRIMINAL LAW, 1.

District of Algoma—Power to issue commission of Oyer and Terminer to.—See CRIMINAL LAW, 2.

Appointment of Armour, J.—349.

JUDGMENT.

Foreign judgment—Proof of.—*Held*, upon the evidence set out in this case, that the foreign judgment was properly proved, for the certificate shewed the person certifying to be the clerk and the seal to be the seal of the Court. *Hughitt v. Saxton*, 49.

Foreign—Proof of.—See INSOLVENCY, 2.

JUDGMENT CREDITOR.

Action by, against shareholder for unpaid stock.—See RAILWAYS, 2.

JUSTICES.

Identification of on motion for certiorari—Affidavit of service—Waiver.—See CERTIORARI.

KNOWLEDGE.

Of defect in highway—Evidence of.—See WAYS, 4.

LAND.

Compensation for.—See ARBITRATION—ASSESSMENT AND TAXES, 3.

Sale of for taxes—Description—Certificate.—See ASSESSMENT AND TAXES, 1, 3.

License to occupy.—See LANDLORD AND TENANT, 2.

LANDLORD AND TENANT.

1. *Estoppel.*—One H., a widow, having possession of the land in question, but no other title, leased it to defendant on the terms, as stated by defendant (there being no writing), that he was to give her \$60 a year as long as she lived, and then to do the best he could with the heirs of her husband, to whom it belonged, she having in fact no title. In an action by the plaintiff claiming under the will of H., and as assignee of her heir-at-law, for rent due after H.'s death: *Held*, that the defendant was not estopped from shewing that H.'s title determined at her death, and that she claimed and professed to give him no greater title.

The defendant under a judgment and execution recovered by him against P., the heir-at-law of H., had P.'s interest in this land put up for sale by the sheriff, when the plaintiff purchased, and paid the purchase money. *Held*, that the defendant was precluded from disputing the plaintiff's title derived under such sale. *Patterson v. Smith*, 1.

2. *Tenancy of land—License—Right to maintain trespass.*—The plaintiff's father owning certain land mortgaged it to A., who filed a bill for foreclosure or sale. The mortgagor soon after the filing of the bill conveyed his equity of redemption to

the plaintiff for a consideration expressed of \$500, but he continued on the land with the plaintiff. The land was sold under a decree of the Court to the plaintiff, who failed to pay, and afterwards the land was conveyed to F., the highest bidder, who the plaintiff swore purchased as trustee for the plaintiff. The plaintiff afterwards released his interest to S., who conveyed to defendant F. Some negotiations, set out in this case, took place between the plaintiff and F. in May, and the plaintiff put in and harvested crops, which defendant D. seized, acting under a writ of possession issued from the Court of Chancery in the foreclosure suit, and assisted by F. and others:—*Held*, that upon the evidence set out in the report there was no demise by will or otherwise to the plaintiff, but a mere license, determined by failure of the negotiations, and under which the plaintiff acquired no interest in the land or crops, which would entitle him to maintain trespass, though he might be entitled to be paid for his work upon the land while the license continued. *Robinson v. Fee et al.*, 448.

LEASE.

See LANDLORD AND TENANT.

LEGISLATURE.

Provincial—Powers of.—*See* INSURANCE, 1.—TEMPERANCE ACT OF 1864, 3.

LIBEL.

See DEFAMATION.

LICENSE.

To occupy land.—*See* LANDLORD AND TENANT, 2.

To sell liquors.—*See* TAVERNS AND SHOPS.

LIFE.

Estate for—Construction of will.—*See* WILL.

LIGHTS.

Window light—Action for obstruction of—Right by prescription—Change of position of windows.—Defendant in 1855 or 1856 built a house on his lot adjoining the plaintiff's, having three windows looking out upon the plaintiff's land. In 1864 the defendant raised his house more than three feet, and none of the windows being more than three feet high, the position of each of them was thus entirely changed: *Held*, that he had acquired no right under the statute, C. S. U. C. ch. 88, sec. 38, for that he had not enjoyed the access or use of the light *at the same place* for the statutory period.

Defendant claimed title by possession for ten years to a small strip of the plaintiff's land, 34 inches in width adjoining his own, having used it for the purpose of banking up his cellar: *Held*, that this claim was properly found against him, such possession being too uncertain, and insufficient. *Hall v. Evans*, 190.

LIMITATIONS, STATUTE OF.

Statute of Limitations—Possession by patentee—C. S. U. C. ch. 88, sec. 3—Title by possession.—In eject-

ment for 25 acres, the north half of the north-east quarter of a 200 acre lot, it appeared that D., the patentee of the north half of the lot, entered upon it before 1837, built a house on the south-west part, and lived there, clearing and cultivating a few acres, and while there sold 75 acres, all but the land in dispute. About 1840 she left the country and joined the Mormons in the United States, but after many years she returned, and died at Fenelon Falls about 1863. It remained vacant until some time between 1849 and 1855, when one A., having a title to the 75 acres sold by D., took possession of it, as well as of the 25 acres in dispute, cut timber on it, and cultivated it and repaired the fences—the 25 acres being then in a state of nature. He remained about ten years, and sold his right for \$10 to the defendant, who succeeded him.

Held, that the plaintiff claiming under D., the patentee, was not entitled to the protection of Consol. Stat. U. C. ch. 88, sec. 3, amended by 27 & 28 Vic. ch. 29, for D. had taken actual possession of this part within the meaning of the Act.

Held, also, that the plaintiff was barred by the statute (the action having been begun on the 22nd March, 1876,) for there had been possession for 20 years after a discontinuance of possession by the patentee.

The defendant, after action brought, offered the plaintiff \$100 if he would give him a warranty deed. *Held*, that this could not affect the defendant's title by possession. *Beigle v. Dake*, 250.

See LIGHTS.

LIQUORS, SALE OF.

See HUSBAND AND WIFE, 3—

TAVERNS AND SHOPS—TEMPERANCE ACT OF 1864.

LOCAL LEGISLATURE.

Power of.—*See* INSURANCE, 1—TEMPERANCE ACT OF 1864, 3.

MAGISTRATES.

Identification of on notice of motion for certiorari—Affidavit—Waiver.]
—*See* CERTIORARI.

MARINE INSURANCE.

See INSURANCE.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See SEDUCTION.

MEMORANDA.

349.

MERGER.

Promissory note—Subsequent acceptance of mortgage—Reservation of remedy—Joint debtors.]
—*See* PRINCIPAL AND SURETY.

MISDIRECTION.

See DEFAMATION..

MORTGAGE.

Mortgage payable by instalments—Covenant to pay the whole on default—Relief—G. O. Chy. No. 461.]—A mortgage, purporting to be under the Act respecting short forms of mortgages was for \$12,500, payable with interest in ten equal annual instalments, and contained a covenant (not following the statutory form: "that in the event of default in the payment of any one instalment or any part thereof he (the mortgagor) will pay unto such mortgagees the said principal money then remaining unpaid, and interest, forthwith after making said default, should the said mortgagees so require (without demand)."

The plaintiff sued on this mortgage, alleging non-payment of the first instalment due on the 12th August, 1877, whereby the whole \$12,500 became due. Defendant paid into Court the first instalment, and as to the residue pleaded that the \$12,500 was a balance of \$14,000, the purchase money of land bought by defendant from plaintiffs, on which he had paid \$1,500; and he prayed for relief and a stay of proceedings.

Held, WILSON, J., dissenting, that such relief might be granted under G. O. in Chancery, No. 461, which is not confined to suits for foreclosure. *Tylee et al. v. Hinton*, 228.

Assignment of policy to mortgagee—Payment of mortgage—Forfeiture by assignor.]—See INSURANCE, 2.

Chattel—Subsequent acceptance of for amount secured by note—Reservation of remedy—Merger.]—See PRINCIPAL AND SURETY.

See CHATTEL MORTGAGE.

MOTION.

Notice of—Defective—Affidavit of service—Waiver.]—See CERTIORARI.

MUNICIPAL CORPORATIONS.

See TEMPERANCE ACT, 1864—WAYS, 4.

NEGLIGENCE.

Trap door—Contributory negligence—Evidence.]—The part of the defendants' office devoted to the public was some 16½ feet long from south to north, the entrance door being at the south, and the width was five feet seven inches. About four feet nine inches from the south, and on the east wall, was a desk or counter for writing messages seven feet six inches long, and one foot seven inches wide. About five inches north of the counter, and in the centre of the apartment, there was a trap door leading to the cellar about two feet nine inches square. On the west side of the apartment was a partition about six feet high, separating the public office from the operator's apartment, the entrance to which was at the north end of the partition. In this partition there was an opening with a desk in it, where also messages were written and delivered to the operator. D. came in quickly to send a message, spoke to the operator at this opening, and then went beyond the counter as if to go into the operator's room, when, the trap door being open, he fell through into the cellar, and received injuries of which he died. There was evidence given to shew that deceased said it was his own fault, and that he ought not to have been where he was: that

the office was a very light one, and that there was no difficulty in seeing the trap, but it also appeared that other persons on other occasions had nearly fallen into it.

The learned Judge, who tried the case without a jury, and viewed the premises, found that the deceased was guilty of contributory negligence, which precluded the plaintiff, his administratrix, from recovering.

Held, that defendants were liable: that the evidence of the open trap door in the part appropriated to the public was negligence for which defendants were chargeable; and that there was no evidence of contributory negligence on the part of the deceased. *Denny v. Montreal Telegraph Co.*, 577.

Ice on sidewalk — Contributory negligence — Notice.]—See WAYS, 4.

NECESSARIES.

Duty of husband to supply wife with — Conviction — Evidence.]—See HUSBAND AND WIFE, 2.

NEW TRIAL.

See DEFAMATION.

NOTICE.

Of motion — Affidavit of service — Defective — Waiver.]—See CERTIORARI.

Insufficiency as to identification of goods.]—See STOPPAGE IN TRANSITU.

Omission to give, of polling — By-law quashed.]—See TEMPERANCE ACT OF 1864.

Sufficiency of — Defect in highway.]—See WAYS, 4.

OCCUPANT.

Of licensed premises — Sale of liquor — Married woman — Conviction of.]—See HUSBAND AND WIFE, 3.

ORDERS.

G. O. Chy. No. 461.]—See MORTGAGE.

OYER AND TERMINER.

Commission of — Power to issue to District Judge of Algoma.]—See CRIMINAL LAW, 2.

PARENT AND CHILD.

See SEDUCTION.

PAROL CONTRACT.

Work done under — Liability.]—See CORPORATIONS, 1.

PAROL EVIDENCE.

See CONTRACT — PRINCIPAL AND SURETY.

PATENT.

Dedication before issue of — Validity.]—See WAYS, 1.

PATENTEE.

Possession by — Title.]—See LIMITATIONS, STATUTE OF.

PENALTY.

Joint for breach of License Act—Validity—Amendment.—See TAV-
ERNS AND SHOPS.

PLEADING.

See INSOLVENCY, 1, 3, 4—RAIL-
WAYS—SEDUCTION.

POLL.

*Omission to give due notice of
polling—By-law quashed.*—See TEM-
PERANCE ACT OF 1864, 1.

POSSESSION.

Title by.—See LIGHTS—LIMITA-
TIONS, STATUTE OF—WILL.

PREMIUM NOTE.

For insurance—Non-payment of.]
—See INSURANCE, 3.

PRESCRIPTION.

*Window light—Change of position
of windows.*—See LIGHTS.

PRINCIPAL AND AGENT.

See BILLS OF EXCHANGE AND PRO-
MISSORY NOTES—CONTRACT.

PRINCIPAL AND SURETY.

*Promissory note—Subsequent ac-
ceptance of mortgage—Merger—Dis-
charge of surety—Reservation of
remedy—Parol evidence.*—B., to the
plaintiff's knowledge, when he became
the holder thereof, endorsed a pro-
missory note for \$1,400, dated 7th

November, 1876, payable four months
after date as surety for H., the maker.
On 3rd February, 1877, before the
maturity of the note, the plaintiff,
without B.'s knowledge, accepted a
chattel mortgage for the amount se-
cured by the note as for some addi-
tional items, with a proviso for re-
demption on 3rd February, 1878, with
interest at ten per cent., and with the
usual covenants for payment. The
mortgage did not on its face refer to
the note, but it was proved that it
was the understanding between the
plaintiff and H. that it was to be
received as collateral security only,
and not to affect the plaintiff's remedy
on the note.

Held, that B., the surety, was not
discharged: that the mortgage did
not operate as a merger of the note,
not being by the same parties and for
the same debt as the note; and that
the reservation of the remedy on the
note, notwithstanding the giving of
time by the mortgage, might be shewn
by parol evidence, without appearing
on the face of the mortgage.

Quere, whether the taking of a
specialty security from one of two
joint debtors on a simple contract
will operate as a merger; and whether
Loomis et al. v. Ballard et al., 7 U.
C. R. 366, can be followed since
Sharpe v. Gibbs, 16 C. B. N. S. 527,
and *Boaler v. Mayor*, 19 C. B. N. S.
76. *Currie v. Hodgins et al.*, 601.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND
PROMISSORY NOTES.

PROSECUTOR.

*Private—Notice of motion for cer-
tiorari—Necessity for service on.*—
See CERTIORARI.

PROVINCIAL LEGISLATURE.

Power of.—See INSURANCE, 1—
TEMPERANCE ACT OF 1864, 3.

PROVISIONAL DISTRICT.

Judge of—Power to issue commission of Oyer and Terminer to.—See CRIMINAL LAW, 2.

PUBLIC SCHOOLS.

High Schools—Mode of assessment—37 Vic. ch. 27, 36 Vic. ch. 48.]—The three united counties of Stormont, Dundas, and Glengarry were formed into five high school districts. *Held*, that under 36 Vic. ch. 48, sec. 383, sub-sec. 6, and 37 Vic. ch. 27, sec. 45, O., the aid granted by the corporation to the high schools to supplement the government grant, must be by an equal rate upon the assessable property of the united counties, not upon each high school district for the sum apportioned to its schools. *Re Chamberlain and Corporation of Stormont*, 279.

RAILWAYS AND R. W. COS.

1. *R. W. Co.—Fraudulent receipts issued by station agent—Liability of Co.*—The agent of defendants at Chatham, a station on their line, having authority to grant bills of lading and shipping receipts for goods, issued such documents representing certain flour to have been shipped by or received from B. & Co., addressed to the plaintiffs at St. John, New Brunswick. Bills of Exchange drawn by B. & Co. on the plaintiffs, and annexed to these bills of lading and receipts, were discounted by a bank at Chatham for B. & Co., and

forwarded to the plaintiffs, by whom they were retired. B. & Co. were a firm of millers at Chatham, of which the agent was a partner, and the bills of lading and receipts, were fraudulently issued by such agent, no flour having been received by him.

Held, HARRISON, C. J., dissenting, that defendants were not liable to the plaintiffs, for the agent in giving receipts for goods never received was not acting within the scope of his authority and employment.

Per HARRISON, C. J.—The agent having been held out by defendants to the public as a general agent for transaction of the particular class of business, in which the public were largely interested, and the plaintiffs having in good faith trusted to his representations made in the ordinary course of trade, and by instruments known to be negotiable, the defendants, who had so enabled him to act to the injury of others, must be responsible, either on the ground of estoppel, or for his deceit. *Erb et al. v. Great Western R. W. Co.*, 90.

2. *R. W. Co.—Action by judgment creditor against a shareholder—C. S. C. ch. 66, sec. 80.*—*Sci. fa.* on a judgment against a R. W. Co., alleging that defendants held thirty shares therein, on which \$1800 remained unpaid. Plea, for a defence which arose after this action, alleging payment of \$1800, the balance due on defendants's stock, to one G. H., a judgment creditor of the company, under a judgment recovered by him against defendants as shareholders. Replication, that G. H. was a creditor only in respect of a claim which he held as trustee for the defendant N. D., and recovered his judgment, and received the money paid to him, as

such trustee, of which defendants had notice.

Held, a good replication, for the payment to N. D., a shareholder, was of no avail as against the plaintiff, an outside judgment creditor. *Nasmith v. Dickey et al.*, 350.

See CORPORATIONS, 1.

RATEPAYER.

When entitled to shew cause to rule to quash by-law.]—See TEMPERANCE ACT OF 1864, 1.

RATES.

Equalization of—Quashing by-law.]—See ASSESSMENT AND TAXES, 2.

REASONABLE CONDITIONS.

See INSURANCE, 1.

RECEIPTS.

Shipping—Fraudulent receipts issued by station agent—Liability of company.]—See RAILWAYS, 1.

REGISTRATION.

Of by-law for opening a street—Necessity for.]—See WAYS, 1.

RENEWAL.

Of chattel mortgage—Statement and affidavit on.]—See CHATTEL MORTGAGE, 1.

RENT.

See LANDLORD AND TENANT.

REPAIR.

Neglect to of road company—Indictment—Motion to quash.]—See WAYS, 3.

REPORT.

Of engineer—Necessity for under 36 Vic. ch. 48, sec. 452 et seq. O.]—See DRAINAGE.

ROAD.

See WAYS.

ROLLS.

Assessment.]—See ASSESSMENT AND TAXES, 2—TEMPERANCE ACT OF 1864, 2.

RULE NISI.

Grounds not taken at trial.]—See DEFAMATION.

Attorney accepting service of—Waiver.]—See CERTIORARI.

SALE OF GOODS.

See CONTRACT—STOPPAGE IN TRANSITU.

SALE OF LAND.

For taxes.]—See ASSESSMENT AND TAXES.

SALE OF LIQUOR.

See HUSBAND AND WIFE, 3—TAVERNS AND SHOPS—TEMPERANCE ACT OF 1864.

SCHOOLS.

See PUBLIC SCHOOLS.

SCIRE FACIAS.

By judgment creditor against shareholder.]—See RAILWAYS, 2.

SEDUCTION.

Action by master—Damages recoverable.—The plaintiff sued for the seduction of E. L., his servant, who had been in his employment for several years, and while there was seduced by defendant, who had been received as a suitor for her. Her brother had been dead many years, and her father, of whom she knew nothing, had left the country fifteen years before, having married again. The action was brought within six months from the birth of the child, which was not born in the plaintiff's house. Defendant pleaded only not guilty, and that E. L. was not the plaintiff's servant. The jury found for the plaintiff and \$500 damages.

Held, that it was unnecessary to aver in the declaration the death of the parents, or shew such facts as enabled the plaintiff to sue as master within the six months, but that it was sufficient to shew a common law cause of action, leaving the defendant to plead any such defence, which was not admissible under the pleas here. *Lake v. Bemiss*, 4 C. P. 430, dissented from.

None of the special grounds for compensation which may be considered in the case of a parent apply in the case of a master or employer, but he is not restricted to his actual pecuniary loss; the damages recoverable must depend very much on the position in his household of the per-

son seduced, &c. ; and in this case the Court refused to interfere for excessive damages. *Ford v. Gourlay*, 552.

SEPARATE ESTATE.

See HUSBAND AND WIFE, 1.

SERVANT.

See SEDUCTION.

SERVICE.

Sufficiency of affidavit of—Notice of motion.]—See CERTIORARI.

SHAREHOLDER.

Action for calls—Discharge in insolvency—Claim not mentioned.]—See INSOLVENCY, 1.

Action against by judgment creditor.]—See RAILWAYS, 2.

SHIPPING RECEIPTS.

Fraudulent, issued by station agent—Liability of company]—See RAILWAYS, 1.

SIDEWALKS.

See WAYS, 4.

STATEMENT.

On renewal of chattel mortgage.]—See CHATTEL MORTGAGE, 1.

STATION AGENT.

Fraudulent receipts by—Liability of company.]—See RAILWAYS, 1.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

R. S. O. ch. 50, secs. 345-8.]—See COSTS.

R. S. O. ch. 152.]—See WAYS, 3.

STATUTES, CONSTRUCTION OF.

27 Eliz. ch. 4.]—See VOLUNTARY DEED.

16 Vic. ch. 190.]—See WAYS, 3.

C. S. C. ch. 66, sec. 80.]—See RAILWAYS, 2.

C. S. U. C. ch. 11, sec. 2.]—See CRIMINAL LAW, 2.

C. S. U. C. ch. 55.]—See ASSESSMENT AND TAXES, 3.

C. S. U. C. ch. 73.]—See HUSBAND AND WIFE, 1.

C. S. U. C. ch. 88, secs. 3, 38.]—See LIGHTS—LIMITATIONS, STATUTE OF.

C. S. U. C. ch. 128, sec. 94.]—See CRIMINAL LAW, 2.

27 & 28 Vic. ch. 29.]—See LIMITATIONS, STATUTE OF.

29 & 30 Vic. ch. 53, sec. 156.]—See ASSESSMENT AND TAXES, 1.

31 Vic. ch. 9, O.]—See VOLUNTARY DEED.

32 Vic. ch. 36, secs. 71, 74, 155, O.]—See ASSESSMENT AND TAXES, 1, 2.

32 & 33 Vic. ch. 20, sec. 25, D.]—See HUSBAND AND WIFE, 2.

32 & 33 Vic. ch. 21, sec. 110, O.]—See CRIMINAL LAW, 1.

32 & 33 Vic. ch. 35, D.]—See CRIMINAL LAW, 1.

33 Vic. ch. 23, sec. 9, O.]—See ASSESSMENT AND TAXES, 3.

33 Vic. ch. 35, D.]—See CRIMINAL LAW, 1.

35 Vic. ch. 80, sec. 4, O.]—See ARBITRATION.

36 Vic. ch. 48, secs. 383, sub-sec. 6, 445, 447, 463.]—See DRAINAGE—PUBLIC SCHOOLS—WAYS, 1.

37 Vic. ch. 27, sec. 45, O.]—See PUBLIC SCHOOLS.

37 Vic. ch. 32, O.]—See TAVERNS AND SHOPS—HUSBAND AND WIFE, 3.

39 Vic. ch. 24, O.]—See INSURANCE, 1.

40 Vic. ch. 12, O.]—See TEMPERANCE ACT OF 1864.

STATUTORY CONDITIONS.

Insurance Co.'s—Power of Provincial Legislature.]—See INSURANCE, 1.

STOCKHOLDER.

See SHAREHOLDER—RAILWAYS, 2.

STOPPAGE IN TRANSITU.

Insufficient notice—Bill of lading—Endorsement.]—W. B. Palmer purchased goods from the plaintiffs in England, which were shipped at Liverpool, in 15 packages, in the name of M. & Co., the plaintiffs' shipping agents, as consignors, consigned to W. B. Palmer & Co., at Hamilton. These goods arrived in three different lots at Hamilton, between the 29th November and 4th December. On the 23rd November, W. B. Palmer & Co., endorsed the bill of lading to McPherson & Co., as security for a debt, and between the 6th and 10th December, the goods were delivered to them by defendants. The plaintiffs had a branch house at St. John, N. B., which, having heard of W. B. Palmer's & Co's insolvency, telegraphed to defendants at Hamilton, on the 5th December: "Do not deliver earthenware from our English house to W. B. Palmer & Co. Hold to our order. Signed, "Clementson & Co.," (the plaintiffs). W. B. Palmer & Co. had then about 400 pieces of goods in defendants' warehouse at Hamilton, and the plaintiffs' names were not on any of the papers in defendants' possession, nor were

the packages so marked that they could be identified.

Held, that the notice was insufficient.

The bill of lading, headed "Montreal Ocean Steamship Company, Allan line, and Grand Trunk Railway of Canada," stated that the goods were to be delivered at Portland, "unto the Grand Trunk R. W. Co., and by them to be forwarded thence by railway to the station nearest to Hamilton," &c. *Held*, that this bill of lading, not having been superseded by any other document, was in force up to the time of its endorsement to McPherson & Co.; and *Seemle*, that such endorsement, though for an antecedent debt, would defeat the right of stoppage *in transitu*. *Clementson et al. v. Grand Trunk R. W. Co.*, 263.

STRANDING.

Vessel — General average.] — *See* INSURANCE, 4.

STREET.

See WAYS.

SURETY.

See PRINCIPAL AND SURETY.

SURVEY.

See INSURANCE, 3.

TAVERNS AND SHOPS.

37 *Vic. ch. 32, O.*—*Keeping liquor for sale without license—Joint conviction and penalty—Amendment.*]—A conviction of S. & D., under 37

Vic. ch. 32, O., as amended, for that they, trading under the name and firm of S. & D., in their house of public entertainment, did unlawfully keep liquor for the purpose of sale, barter, and traffic therein, without the license by law required, and adjudging them for their said offence to pay \$40 and costs:

Held, bad, for that the defendants could not be jointly convicted, nor one penalty awarded against them jointly.

Held, also, that such conviction could not be amended. *Regina v. Sutton et al.*, 220.

See HUSBAND AND WIFE, 3.

TAXES.

See ASSESSMENT AND TAXES.

TELEGRAMS.

Contract by.]—*See* CONTRACT.

TEMPERANCE ACT OF 1864.

1. *Omission to give due notice of polling—By-law quashed.*]—A county by-law under the Temperance Act of 1864, passed on the 27th of September, 1876, and voted on on the 6th of November following, was quashed, upon motion made on the 25th May, 1877, on the ground that in several of the municipalities notice of taking the poll was not given in time, and was not put up in four public places, as required by the statute; it appearing that but for these irregularities the result might have been different.

Where the corporation did not support the by-law; but the Warden wrote to the representative of a class

interested in doing so to take such measures as they might think proper, counsel instructed by them was heard to shew cause. *Seemle*, that any of the electors might be heard to support such a by-law if the council should fail to appear. *Re Mace and Corporation of Frontenac*, 70.

2. *Voters' lists and assessment rolls.*]—An application was made to quash a by-law passed under the Temperance Act of 1864 by the united counties of Northumberland and Durham, by a majority of 2752, on the ground that the assessment rolls and not the voters' lists were used throughout the counties, and that in four municipalities the assessment rolls of 1877 were used instead of those of 1876. It was not attempted to be shewn, however, that the result of the voting would otherwise have been different; and the rule therefore was discharged, with costs.

Quere, whether the objection was valid, or whether, notwithstanding the 40 Vic. ch. 12, O., making the voters' list applicable to municipal elections, the vote, according to *Lake and the Corporation of Prince Edward*, 26 C. P. 173, should not still be taken as prescribed by the Temperance Act.

Where a rule asks to quash a by-law on the ground that the poll was illegally taken, and there was no valid poll taken, and that the assessment rolls were used instead of the voters' lists, and the rolls of the wrong year, the applicant is confined to the specific illegality pointed out as regards the poll. *Re Reubottom and the Corporation of Northumberland and Durham*, 358.

3. *Conviction for selling liquor without license—Validity of—Powers*

of Local Legislature.]—In a municipality where the Temperance Act of 1864 was in force, defendant was convicted for unlawfully keeping in his house of public entertainment, known as the Queen's Hotel, liquor for the purpose of sale, &c., without the license therefor by law required.

Held, that the conviction was bad, for that the only conviction that could be valid would be for keeping liquor for sale contrary to sec. 12 of the Temperance Act of 1864, which forbade its being kept, and while in force no license to keep liquors in an hotel could issue.

Seemle, that it is *ultra vires* of the Legislature of Ontario to enact that the provisions of the Licensing Acts of Ontario shall have full force and effect in a municipality where the Temperance Act is in force, so as to make the offence against the one an offence against the other. *Regina v. Prittie*, 612.

TENANT.

Tenant shewing landlord's title determined—Estoppel.]—See LANDLORD AND TENANT, 1.

See LANDLORD AND TENANT.

TITLE.

By possession.—See LIMITATIONS, STATUTE OF.

Proof of.]—See WILL.

TRAP-DOOR.

Accident—Negligence—Contributory negligence—Evidence.]—See NEGLIGENCE.

TRESPASS.

Right to maintain—Tenancy of land—License.—See LANDLORD AND TENANT, 2.

TRIAL.

Powers of County Judge when trying prisoners summarily.—See CRIMINAL LAW, 1.

ULTRA VIRES.

Contract—Executed Consideration.—See CORPORATIONS, 1.

See TEMPERANCE ACT OF 1864, 3.

USAGE.

See CONTRACT.

VESSEL.

Stranding—General average.—See INSURANCE, 4.

VOLUNTARY DEED.

27 Eliz. ch. 4.—*Abandonment of claim*—In ejectment, the plaintiff claimed under a deed from her father, made in 1846, on the day after her marriage, expressed to be in consideration of natural love and affection, and of £5, in fee, reserving, however, the use and occupation of the premises to the grantor and his wife during their lives and the life of the survivor; and on the condition that the plaintiff should cause the land to be properly cultivated and furnished a comfortable maintenance and support to the grantor and his wife for the remainder of their respective lives; and also that, after their decease, the plaintiff and

her heirs should pay to each of her sisters £25. No other condition was proved except as above expressed. The plaintiff and her husband lived with her father and mother on the land for several years, but separated in 1854, and went to the United States, having had constant disagreements, and did not return until 1876. In 1854, the father sold and conveyed the land for value to the defendant.

Held, WILSON, J., dissenting, that the deed to the plaintiff must be regarded as a voluntary deed, there being no binding agreement to perform the condition as to maintenance &c., or to pay the sums named to the sisters; and that it was therefore void under the 27 Eliz. ch. 4, as against the defendant, a subsequent purchaser for value, though with notice.

Per WILSON, J., the evidence as to whether the plaintiff in 1854, abandoned the land and all claim to it or only during the life of her parents, was not sufficient to warrant the inference of abandonment. *Per* HARRISON, C. J., such conclusion might fairly be drawn from it.

The 31 Vic. ch. 9, O., did not apply to the case, defendant's deed having been obtained before 28th February, 1868. *Demorest v. Miller*, 56.

VOTERS.

See TEMPERANCE ACT OF 1861, 1.

VOTERS' LISTS.

See TEMPERANCE ACT OF 1864, 2.

WAIVER.

Of insufficient affidavit of service.—See CERTIORARI.

WARRANTY.

See INSURANCE, 3.

WATER COMMISSIONERS.

See ARBITRATION. — CORPORATIONS, 2.

WAYS.

1. *Highway—Dedication—By-law establishing.*]—In trespass q. c. f. it appeared that in 1858, one G., a surveyor, under whom the plaintiff claimed, obtained a patent for the land in question, which he had previously claimed to own. In 1857, he got up and presented to the municipal Council a petition to open a road through the lot, as a continuation of R. street in the village of Collingwood. A by-law was passed accordingly in November, 1857, and G. ran the line for the road, which was afterwards made; \$200 being expended by the Council, but not on G.'s land, it not being required there. The road was used by the public as early as 1857, without objection by G., though he at one time placed a gate to keep cattle out of his farm, the road being unfenced. The road as used deviated at one point on G.'s land from the line of R. street, owing to a ravine.

Held, that G. had no power to dedicate before he obtained the patent, but that his subsequent acts amounted to a dedication.

Semble, that the by-law was sufficient, for it shewed that the extended road was to be in projection of R. street, the course of which could be readily ascertained; and that it did not require registration under 36 V. ch. 48, sec. 445, having been passed

before that Act. *Beveridge v. Creelman et al.*, 29.

2. *Will—Construction—Provision for the use of a lane—Right to remove gate.*]—A testator devised part of lot 17 to his son Charles, and part of lot 18, adjoining it to the east, to his son William, adding that, in order to give Charles free access to and from the side road on the east side of lot 18, the lane or road "now running across" the land devised to William, "commencing at my gate on said side road," and in width half a chain, to the west limit of 18, should be kept open for the free use of his said sons, with a proviso that should the whole estate bequeathed to them come into the possession of any one person, this provision, "in reference to the continuance of said lane or road," should become void.

Held, that the testator evidently intended that the lane should be continued as then existing and used; and that the defendant, claiming under Charles, had no right to remove the gate on the side road. *Vansickle et al. v. Kelly*, 274.

3. *Road company—Neglect to repair — Indictment — R. S. O. ch. 152.*]—A road company, incorporated under 16 Vic. ch. 190 and subsequent Acts, (now R. S. O. ch. 152) are not subject to indictment for not keeping their road in repair, where the liability to repair is admitted; the special remedies given by the Act must be resorted to. But where the dispute is, whether the part out of repair is part of defendants' road, an indictment will lie.

Semble, that the proper mode of objecting to such an indictment is not by demurrer, but by removing the indictment by *certiorari*, and

moving to quash it upon affidavit shewing the facts. *Regina v. Ottawa and Gloucester Road Co.*, 478.

4. *Municipal corporations—Ice on sidewalk—Notice—Negligence—Contributory negligence—Evidence*]—A sidewalk on one of the streets in the city of Toronto, to the distance of 500 feet, and near the centre of the city, was covered with ice. There was no evidence of any actual notice to the defendants of its existence, but it was proved that the city commissioner, whose duty it was to enforce the city by-laws, one of which was the removal of ice and snow from the sidewalks, had frequently driven up and down the street and past this sidewalk, without taking any steps to enforce the removal of the ice. It did not appear, however, that he ever noticed, or that any complaint had ever been made to him, concerning the condition of the sidewalk. The female plaintiff, while walking over the sidewalk in broad daylight, slipped on the ice and fell, and received a severe injury, but it was proved that she was well aware of the state thereof, as she lived close by, frequently passed over it, and had already passed over it on the day of the accident.

Held, that defendants were not liable.

Per HARRISON, C. J., because the plaintiff was guilty of contributory negligence.

Review of the authorities as to liability for accidents caused by snow or ice.

Per WILSON and ARMOUR, JJ., that there was no negligence on defendants' part, for that there was no proof of notice to them, the mere fact of the commissioner passing along the street being insufficient to raise

any presumption of notice; and that there was contributory negligence on the plaintiff's part, for she was well aware of the condition of the sidewalk, and need not have used it.

Per HARRISON, C. J., the default which will render a municipal corporation liable in a civil action for neglect to repair, need not be such as would subject them to indictment. *Ringland v. Corporation of Toronto*, 23 C. P. 93, remarked upon. *Burns et ux. v. Corporation of Toronto*, 560.

See DRAINAGE.

WIFE.

See HUSBAND AND WIFE.

WILL.

Construction—Estate for life—Ejectment—Proof of title—Estoppel.]—A testator devised all his real and personal estate to his beloved sons E. and J. in fee, "subject, however, to the following conditions: "First. That my beloved daughters" (six in number, naming them) "shall have at all times a privilege of living on the homestead and maintained out of the proceeds of the said estate during their natural lives." *Held*, that the daughters took a life-estate in the homestead, and that the death of some of them did not diminish the right of the survivors. *Held*, also, that the defendants, who entered claiming title under the same will as the plaintiff (the plaintiff claiming under E.), were properly prevented at the trial from setting up title by possession independently of the will; but to avoid embarrassment in entering a general verdict for the defendants (two of the daughters and their tenant), the notice as to this

mode of title was struck out of the record. *Bartels v. Bartels et al.*, 22.

Construction of — Provision for use of lane—Right to remove gate.]—See WAYS, 2.

WINDOWS.

Obstruction of light to—Prescription.]—See LIGHTS.

WORK AND LABOUR.

Parol contract—Executed consideration.]—See CORPORATIONS—LANDLORD AND TENANT, 2.

WORDS, MEANING OF.

“Such appropriation.”]—See ARBITRATION.

“Steam barge.”]—See INSURANCE, 4.





